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91-924

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAYAL PARDASANI, Petitioner

v.

SIEMENS ENERGY AND
AUTOMATION, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Court can dismiss the Plaintiff's national origin discrimination and retaliatory termination claims for failure to present a prima facie case after the Defendant has presented non-discriminatory reasons for a Plaintiff's dismissal and failure to be promoted.

2. Whether or not the application of the pretext standard of McDonnell Douglas v. Green, 411 U.S. 792 (1973) or the "mixed motive" standard of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) presents a mixed question of law and fact, the appellate review of which is not limited by Federal Rule of Civil Procedure 52 (a).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAYAL PARDASANI, Petitioner

v.

SIEMENS ENERGY AND
AUTOMATION, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dayal Pardesani, respectfully prays that a writ of certionrari issue to review the opinion of the United States Court Of Appeals for the Fifth Circuit, entered in the proceedings on August 28, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals filed on August 28, 1991, in No. 91-1106 is set forth in the Appendix at (App. 1.) The Court determined that the opinion would not be published.

The final judgment of the District Court in Civil Action No. J89-02462 entered on December 17, 1990 is set forth in Appendix at (App. 23.) The findings of Fact and Conclusion of Law made by the District Court in Civil Action No. J89-0246 (2) and filed on December 5, 1990 is reprinted in the Appendix at (App. 25.) Neither is published.

The determination letters of the Equal Employment Opportunity Commission ("EEOC") regarding both charges 131-87-1056 and charge 131-88-0095 are set in the Appendix at (App.75) and (App. 92,) respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1991.

The jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The statute involved is Title VII of the Civil Rights Act of 1964, Section 2000e-2, Section 2000e-3.

STATEMENT OF THE CASE

Proceedings Below

This case involves claims of national origin discrimination and retaliatory termination for filing a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The Court of Appeals affirmed the magistrate's dismissal of the claims of national origin discrimination and retaliatory termination for failure to establish a prima facie case after the defendant had presented evidence of legitimate reasons for its action. In addition, the Court of Appeals affirmed the magistrate's application of the the "pretext" scheme of McDonnell Douglas v. Green, 411 U.S. 792 (1973) to the case rather than the "mixed motive" scheme of Price Waterhouse v. Hopkins, 490 U.S. 228

(1989). Jurisdiction of this matter was conferred in the Court of Appeals by 28 U.S.C. Section 1291.

At the trial level, the magistrate dismissed the plaintiff's claims of age discrimination and race discrimination at the close of the plaintiff's case. The dismissal of those claims was not appealed. The magistrate had earlier granted the defendant's motion to dismiss as to plaintiff's claims of religious discrimination, defamation, intentional infliction of emotional distress, and violation of 42 U.S.C. section 1981. The dismissal of these claims was also appealed.

Facts

Between May, 1987, the time that the petitioner filed his first charge with the EEOC, and October 23, 1987, the date that the respondent terminated the petitioner,

(App. 168), the petitioner's supervisor, Tom McClendon, stated

> "If I get rid of the minorities out there, I'll be hard pressed to hire another one." (App. 168)

Mark Anderson, a former co-worker of the petitioner's testified that the petitioner supervior, Tom McClendon, made this statement to him. (App. 168). The petitioner contends that if this statement were the only statement of ethnic animus toward him, which it is not, it alone conclusively demonstrates that the respondent had other than legitimate reasons for terminating and failing to promote him. This statement demonstrates an affirmative intent to eliminate minority employees, and a further intent not to hire any more. This statement alone requires application of the "mixed motive" standard of Price Waterhouse v. Hopkins 490 U.S.

228 (1989).

The magistrate did not address this statement in his findings of fact (App. 25). The Fifth Circuit, apparently by mistake, addressed a similar statement, but one with a very different meaning than that which was made by the petitioner's supervisor at the respondent Seimans. In its written opinion, the Fifth Circuit assumed that the statement made by the petitioner's supervisor was "If I get rid of the minorities out there, I'll be pressed to hire another." (App. 21) When the word "hard", is omitted, the statement takes on a very different meaning. This second statement which was discussed by the Fifth Circuit, suggests that the speaker is also resigned to having minorities on the job, because if the speaker did fire them, he would be pressured to hire others. The second

statement, while itself offensive, does not communicate the affirmative intention to fire minorities as does the one that was actually made.

The supervisor's statement of an affirmative intention to fire minority employees, must be considered in light of the derogatory and racist statements which were made by this same supervisor directly to the petitioner. This same supervisor said that he thought that Hindu was something that you stepped in the back yard. (App. 161). When referring to traditional Indian wear, this same supervisor informed the petitioner that his wife would not have gotten pregnant if the petitioner had not been wearing a "dress". (App. 151). This same supervisor, when discussing the bombing of an Air India Jet, stated, "You Indians are like that, you kill each other".

(App. 111). Again when discussing fighting between Sikhs and Hindus, this same supervisor informed the petitioner that "You Indians are like that, you kill each other". (App. 112).

This same supervisor made offensive remarks about minorities who came to interview with the respondent Seimans. These are people who the respondent did not know and had no ostensible reason to joke with or about. (App. 149). Moreover, the superior of this same supervisor reported this supervisor's racist comments to the upper level management of respondent Seimans. (App. 155). Nothing was done to this supervisor.

Predictably, the respondent Seimans asserted that it did not promote and then terminate the petitioner because of problems with the petitioner's work, budgetary constraints, an allegation that

the petitioner violated the respondent's security rules, and insubordination. The allegation that the petitioner's work suddenly became unacceptable after he had been working for the respondent for five years is most incredible. The normal interchange between systems' analyst such as the petitioner, and those who use the program that they design, was placed in proper perpective by the testimony of Norm Smith, the petitioner's supervisor at the respondent Seimans from November 23, 1981, when the petitioner was hired, through June, 1986, when Norm Smith terminated his employment with the respondent Seimans.

In December, 1986 the petitioner had received a job performance rating of 2.3 for the period from October, 1985 through September 1986. (App. 131, 132). A rating of 2.3 on the scale used by the respondent indicated that job performance

was less that the expected level. (App. 132.) The petitioner's supervisor indicated that the job performance rating was based on the negative comments of three users of computer programs designed by the petitioner. (App. 130, 131)

Mr. Smith testified that it was "common" to have user's complaint about the work of system's analysts, of which the petitioner was one. (App. 145, 146). Mr. Smith further indicated that those who understand technology would not consider three negative users' comments a universally negative appraisal. (App. 147).

Mr. Smith's comment that three negative user comments do constitute a universally negative appraisal are butresssed by the fact that other users rated the petitioner's work "very good"

(App. 114) and "A" plus (App. 115) as late as August, 1987. The petitioner was terminated on October 23, 1987. (App. 109).

As an explanation of the reason that the petitioner was not promoted, the defendant presented testimony at trial that the the respondent Seimans had made a decision not to fill the position that had been vacated by the elevation of the petitioner's supervisor. To the contrary, the testimony of Norm Smith who had worked at respondent Seimens established that the designation as senior system analyst was a status and did not require being "placed" in a position. (App. 144).

The respondent put forth violation of security rules as one reason for terminating petitioner. The respondent's security system was implemented in

September, 1987 on the recomendation of Price Warehouse. (App. 135). The petitioner's supervisor testified that the purpose of the security system was to leave an audit trail for system analysts (App. 135) and to prevent data from being complied into production libraries. (App. 136). Dane Truett, who at the time was a system programmer was assigned to design the security system.

At about the same time that the security system was implemented, the petitioner's supervisor had assigned him to make some changes to a tag print program which the petitioner had originally drafted (App. 134, 135) and on which he had received positve feedback on (App. 121).

The petitioner tried as hard as he could to make the requested changes to the tag print program. The same supervisor who

made the racist remarks discussed above, Tom McLendon, admitted that there were certain things that the petitioner needed to do on the tag print program which could only be done after hours and on weekends. (App. 142). The petitioner worked on some Saturdays. (App. 160). He told Dane Truett, the author of the security system, of the problems that he was having making changes to the tag print program. (App. 160) Truett, who eventually completed the tag print program, and had the knowledge to do so because he designed the security system, testified that he did not tell the petitioner that the information that the petitioner thought that he needed to complete the program was built into the program. (App. 158).

The petitioner also told Tom McLendon, the same supervisor who made the racist remarks discussed above, that he was

experiencing problems making changes to th tag print project. (App. 139). Rathe than helping the petitioner, Tom McLendo referred him back to Dane Truett. (App 140). The respondent had the petitione trapped in a web, with his programmin tools changed and no one willing to hel him find a way out.

It wasn't until October 22, 1987, a day after the project had been taken away from petitioner on October 21, 1987, that directions on how to use the security system were distributed. (App. 171, 172). Nathan Slater, another coworker of the petitioner's at Seimans, testified that after the security system was implemented, the petitioner could not access the necessary tools that he needed to complete the project that he was working on without assistance (App. 171). The respondent had the petitioner just where it wanted him.

Pushed against the wall, smelling a set-up, knowing that he was doing all that he could to complete the tag print program, the petitioner naturally hesitated when his supervisor asked him for the tag print program. The petitioner does not deny that at first he refused to give it to his supervisor. (App. 127, 128). Nervous when initially approached by his supervisor, the petitioner later had to give the supervisor some more information pertaining to the tag print program that he had forgotten to give to him (App. 128). Even the petitioner's supervisor Tom McLendon, the same supervisor who made the rude racist remarks discussed above, admitted that this was the only act of insubordination that he knew of by the petitioner.

Even before his final days at

respondent Seimans, the petitioner had noticed that he was being treated differently from his coworkers by his supervisor Tom McLendon, the same supervisor who made the racist remarks discussed above. After May, 1987, when he filed his first charge with the EEOC, the petitioner noticed that work was being withheld from him until the date that it was due or past due. (App. 117, 118). This increased the pressure on the petitioner to complete the work and generally made him less comfortable at his job.

The petitioner's supervisor, Tom McLendon, also discuseed the petitioner with other data processing professionals on the petitioner's level. (App. 166) The petitioner was never asked to be in charge of the department while his supervisor was away even though he was the most senior

member of the professional staff. Norm Smith, the petitioner's supervisor prior to Tom McLendon, testified that the office policy had been to rotate this unofficial honor among senior staffers in the office.

REASONS FOR ALLOWANCE OF THE WRIT

1. In affirming the District Court's continued evaluation of the petitioner's prima facie case after the respondent had presented its defense to the petitioner's retaliatory termination and national origin discrimination claims, the Court of appeals endorsed a practice which is in direct conflict with the decisions of the Supreme Court in Untied States Postal Service Board of Governor v. Aikens, 460 U.S. 711 (1983 and Bazemore v. Friday, 478 U.S. 385 (1986).

2. The Courts have not resolved whether in title VII actions, the application of the pretext standard of McDonnell Douglas v. Green, 411 U.S. 792 (1973) or the "mixed motive" standard of Price Warehouse v. Hopkins, 490 U.S. 2128

(1989) inherently presents a mixed question of law and fact, the appellate review of which is not limited by Federal Rule of Civil Procedure 52 (a).

ARGUMENT

A. THE COURT OF APPEALS ERRED IN AFFIRMING THE MAGISTRATE'S DISMISSAL OF THE NATIONAL ORIGIN DISCRIMINATION AND RETALIATORY DISCHARGE CLAIMS FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE AFTER THE DEFENDANT PRESENTED ITS EVIDENCE

This case involves the petitioner's appeal of the dismissal of his case based upon national origin and retaliatory termination. The Fifth Circuit held that even after the defendant has presented its defense, the plaintiff's case may nevertheless be dismissed for failure to present a prima facie case. (App. 17). This opinion directly conflicts with the

decisions of this Court.

In United States Postal Service Board of Governors v. Aikens, 460, U.S. 711, 103 S. Ct. 1478, 1482 (1983), the Supreme Court stated without qualification that once a defendant presents evidence of legitimate nondiscriminatory reasons for a plaintiff's dismissal, whether the plaintiff established a prima facie case is no longer at issue:

> The prima facie case method established in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experince as it bears on the critical question of discrimination. (Citations ommitted) Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The District Court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff.

(Citation Omitted.)

103 S.Ct. at 1482

More recently, in Bazemore v. Friday, 478 U.S. 385, 398, (1986), in the context of a pattern-and practice case, this principal was unequivocally affirmed:

> ...if the defendant has not succeeded in having a case dismissed on the ground that plaintiffs have failed to establish a prima facie, and have responded to the plaintiff's proof by offering evidence of their own, the factfinder then must decide whether the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination.

Nevertheless, the magistrate continued to evaluate the prima facie case after the defendant had presented its defense. In the findings of fact and conclusions of law issued following the presentation of

evidence by both sides the magistrate concluded that:

> In order to establish a prima facie case of national origin discrimination concerning his termination, the plaintiff must show (1) that he was a minority group member; (2) that he was qualified for the job; (3) that he was discharged; and (4) after his discharge, the employer either hired a non-minority group member to replace him or retained a non-minority had engagaed in conduct similar to that which caused the plaintiff's termination. (Citations Omitted). The plaintiff failed to establish the second and fourth elements of his prima facie case. (Emphasis added.)
>
> (App. 52)

Simiarly, when considering the plaintiff's claim that he was discharged in retaliation for filing a May 20, 1987 charge of discrimination with the EEOC, the opinion of the magistrate states:

> To establish a prima facie case of unlawful retaliation, plaintiff must show:..
>
> The plaintiff's evidence does not establish a prima facie case because it does not show a "casual connection...
>
> (App. 56)

Despite the clear mandate from the Supreme Court, in Aikens 460 U.S. 711 (1983) and Bazemore, 478 U.S. 385 (1986), the court of appeals affirmed the trial court's continued references to whether a prima facie case had been made on the plaintiff's national origin discrimination and retaliatory discharge claims, even though the defendant had responded to the plaintiff's case by offering evidence of its own:

> After a discrimination case is fully heard on the merits, the court usually should not address the issue of plaintiff's prima

> facie case, but instead address the ultimate issue of discrimination. Aikens at 714-715 When, however, a court, upon hearing additional evidence regarding the plaintiffs qualification and replacements, finds that the plaintiff failed to meet his initial burden, it may vacate an earlier finding and dismiss the case for failure to prove a prima facie case. Here the court correctly dismissed the actions for failure to prove a prima facie case. The record supports the court's findings. They are not clearly erroneous. (Emphasis added).
>
> (App. 17)

The decision of the court of appeals in this case clearly conflicts with the prior decisions of the Supreme Court.

B. THE FIFTH CIRCUIT ERRED IN REVIEWING UNDER THE "CLEARLY ERRONEOUS" STANDARD THE MAGISTRATE'S APPLICATION OF THE PRETEXT SCHEME OF MCDONNELL DOUGLAS v. GREEN RATHER THAN THE "MIXED MOTIVE" SCHEME OF PRICE WATERHOUSE v. HOPKINS TO THE PLAINTIFF'S NATIONAL ORIGIN DISCRIMINATION AND RETALIATORY DISCHARGE CLAIMS.

Between the time that the petitic filed his first charge with the EEOC, the date that the respondent terminated petitioner, the petitioner's supervis Tom McLendon, stated:

> "If I get rid of the minorites out there, I'll be hard pressed to h another one."

At trial and on appeal, the petitio contended that both the content and tim of this statement conclusively demonstr an intent to terminate him because of national origin in violation of 42 U.S. Section 2000e-2 and because of the pr charge that he filed at the EEOC violation of 42 U.S.C. Section 2000e Other statements such as Hindu be something that you stepped in in

backyard were also made by this same supervisor.

As stated in A. above, after the respondent presented its defense at the trial, the magistrate continued to evaluate whether a prima facie case was presented. The court of appeals made an explicit determination that the magistrate dismissed the plaintiff's case for failure to make a prima facie case and affirmed the magistrate's dismissal on this basis. However, despite continuing to evaluate the prima facie case, the magistrate also discussed the legal standard to be applied in determining the ultimate issue of discrimination.

In reviewing the applicaiton of the proper standard to determine whether discrimination occurred, the court of

appeals is not restricted by the "clear erroneous" standard:

> Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.
>
> Bose v. Consumers Union of U.S. 466 U.S. 485, 501 (1984)

The petitioner contends that the langua in the magistrate's opinion to the effe that even if the plaintiff had made a pri facie case, the court would find national origin discrimination and no retaliatory discharge was broug about the magistrate's failure to apply t "mixed motive" standard of Price Waterhou v. Hopkins, 490 U.S. 228 (1989). The Cou of Appeals affirmed the magistrate application of the pretext standard McDonnell Douglas, 411 U.S. 792 (1973)

Because the magistrate and the Fifth Circuit misapplied the rules of law to the facts the review of this issue on appeal is not limited by Rule 52(a).

This Court has previously held that a finding of discrimination is a finding of fact. Pullman-Standard v. Swint, 456 U.S. 273 (1982). The Pullman-Standard Court further stated that "(D)iscriminatory intent here means actual motive;" Id. at 290.

The instant case raises a situation explicity left unresolved by the Pullman-Standard opinion, 456 U.S. 273, 289 (1982). In footnote 19 the Court states:

> We need not, therefore, address the much-mooted issue of the applicability of Rule 52 (a) standard of mixed questions of law and fact-- i,e, questions in which the historial

facts are admitted or established, the rules of law is undisputed, and the issue is whether the facts satisfy the statutory standard or put it another way, whether the rule of law applied to the established facts is or is not violated.

Pullman-Standard v. Swint
456 U.S. 273, 289 (1982)

The fact situation which the Pullman-Standard Court declined to address is precisely that which the instant case presents. The historical facts are established. Mark Anderson, a coworker of the petitioner's indicated that the petitioner's supervisor said, "If I get rid of the minorities out there, I'll be hard pressed to hire another." (App.168). Other comments such as "Hindu is something that you step in in the backyard were also made. (App. 161). The petitioner's superviso never

denied making the latter remark.

The two rules of law which are applicable have been established by this court: (1) the "pretext" scheme of McDonnell Douglas v. Green, 411 U.S. 792 (1973) and (2) the "mixed motive" scheme of Price Waterhouse 490, U.S. 228 (1989). The court must then determine which is applicable. The petitioner contends that this is a question which an appellate court can review de novo. The Fifth Circuit stated that it was restricted by the "clearly erroneous" standard".

Moreover, even if the "clearly erroneous" standard of review applied to the magistrate's decision as to whether to apply the "mixed motive" standard of McDonnell Douglas 411 U.S. 792 (1973) or

the "pretext" standard of Price Waterhouse 490 U.S. 228 (1989), to the facts, it is apparent that the magistrate's choice was "clearly erroneous". This court has stated that a finding is clearly erroneous when:

> the reviewing court on the entire evidence is left with a definite and firm conviction the a mistake has been committed.
>
> United States v. Gypsum 333 U.S. 364, 395 (1948)

As discussed more fully above, the facts concerning the termination of the petitioner's employmnt at respondent Sieman's and the remarks made while he was working there, demonstrate particularly egregious national origin animus and display a thinly veiled scheme to retaliate against him and force him out of the respondent company.

The statement, "If I get rid of the

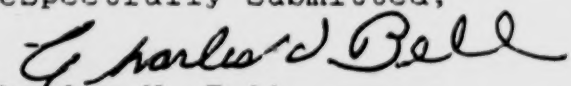
minorities out there, I'll be hard pressed to hire another one" was made between the time that the petitioner's first EEOC charge was filed and the date of his termination. The petitioner submits that this statement certainly when combined with the facts outlined above in "Statement of the Case" conclusively demonstrate that the magistrate's decision to apply the "pretext" standard was clearly erroneous.

CONCLUSION

For the foregoing reasons, a writ of ceriorari should issue to review the decisions of the United States Court of Appeals in this case.

Dated: November 22, 1991

Respectfully submitted,



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APPENDIX

Description

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1106
Summary Calendar

DAYAL PARDASANI, Plaintiff-Appelant.

versus

SIEMENS ENERGY AND AUTOMATION, INC., Defendant-Appellee.

Appeal from the United States District Court
for the
Southern District of Mississippi
(CA-J89-246 (L))

(August 28, 1991)

Before CLARK, Chief Judge, SMITH and WIENER, Circuit Judges

PER CURIAM:*

I.

Dayal Pardasani appeals from the Magistrate's dismissal of his claims of national origin discrimination and retaliatory termination against defendant Siemens Energy and Automation, Inc. (Siemens). We affirm.

II.

In 1981, Siemens hired Pardasani as a systems analyst. From 1982 through 1985, Pardasani received favorable annual evaluations from his supervisor, the Manager Of Information Systems, Norm Smith.

Pardasani's job involved receiving requests from other departments in the company and developing and modifying computer software to meet these requests.

In 1986, Siemens became dissatisfied with Smith and the Information Systems Department. As a result Smith resigned and Siemens appointed Tom McLendon, the most senior employee in the Department, as Acting Manager in charge of the applications side of the Department. McLendon reported to controller Bob Steil.

McLendon and Pardasani had worked together in the same department for years, but had what the Plaintiff termed a "sour relationship.

After only three months as Acti
Manager, McLendon was to perform the annu
evaluation for Pardasani, due in October
1986. Because he had been supervisor for
period, McLendon solicited comments a
reviews from other supervisors in t
company. Based on this information
McLendon completed his evaluation and me
with Pardasani to review it. Pardasan
refused to accept his evaluation of 2.3 o
a 5 point scale, claiming that a
unsatisfactory work resulted from impropе
instructions from the requesting party. A
a result of his poor evaluation, Pardasan
did not receive a raise in 1986-87.

Pardasani complained to the Employe
and Community Relations Manager, Michae
Goryl regarding his evaluation. After
meeting between Pardasani, McLendon a
Goryl, the evaluation remained the same
Goryl also expressed dissatisfaction wit
Pardasani's work.

In February 1987, Pardasani requested a leave of absence to go to India and attend his father's funeral and settle his father's affairs. His request was granted. During Pardasani's absence, which extended beyond his accrued vacation time, McLendon made sure that Pardasani received full pay, a $1,000 advance pay for the airline ticket and participated in a collection to assist Pardasani.

In May 1987, Pardasani filed a claim with the Equal Employment Opportunity Commission (EEOC), alleging age, race, and religious discrimination in the denial of a fair evaluation and promotion to senior analyst. In actuality, nobody was ever promoted to senior analyst. In acctuality, nobody was promoted to senior analyst after McLendon became Acting Manager. Siemens declined to fill the vacancy in order to save money.

Subsequent to Pardasani's evaluation and meeting with Goryl and McLendon, his work performance started to decline, as noted in his personnel file.

In September 1987 Siemens implemented a security system for its computers which limited access to programs in order to prevent more than one analyst from working on a program at one time. At this time, Siemens also restricted access to ICCF libraries (the actual locations in the computer where the programmer/analyst would work on changing programs or creating new ones). Both of these changes were implemented at the suggestion of a Price Waterhouse auditor's report regarding the Information System Department.

On or about September 21, 1987, Pardasani received an assignment to modify a tag print program. Pardasani repeatedly delayed the due date for the completed

project. Despite two extensions, the progarm incomplete one and a half weeks after the initial due date.

Pardasani alleges that the restrictions for the new security systems and library access caused delays. Despite these difficulties, Pardasani claims that the program was almost complete on October 19. Testimony of other witnesses contradict Pardasani. At first Pardasani claimed he could not complete the project without greater access and then he claimed he was almost finished. One system analyst testified that all the analysts knew the security restrictions and library access restrictions, but still had access to all the tools and information required to complete assignments. Data Processing Systems Supervisor Truhett testified that Pardasani called him one weekend asking for information to circumvent the security

system for working on the tag print program. Truhett told Pardasani to ask McLendon for permission, which Pardasani never did.

The Monday following this conversation, at McLendon's direction, Truhett took over the tag print program and found first that Padasani had not progressed to the extent represented and second that completion was possible without violating the security system, despite Pardasani's claims to the contrary. As a result of Pardasani's failure to complete the program, McLendon asked him to turn over the project on October 19, 1987. At first Pardasani refused to do so, keeping to himself the information and location of ICCF libraries needed to complete the project. After McLendon asked a few more times, coupled with a threat of termination for failure to comply with the Manager's

orders. Pardasani agreed to turn over all of the requested information. When McLendon received the information from Pardasani, McLendon understood that he had all the necessary information. however, later that same day Pardasani advised McLendon in writing of additional information needed to complete the program. After McLendon asked a few more times, coupled with the Manager's orders, Pardasani agreed to turn over all of the requested information. When McLendon received the information from Pardasani, McLendon understood that he had all the necessary information, however, later that same day Pardasani advised McLendon in writing of additional information needed to complete the program.

This last turn of events prompted McLendon to meet with Goryl and discuss Pardasani's performance, specifically

McLendon's loss of trust in Pardasani and fear for the security of the data processing information. After speaking with several corporate officials, Goryl decide to terminate Pardasani for insubordination and unsatisfactory work performance. Pardasani was terminated Octobert 23, 1987. McLendon and other existing system analysts assumed Pardasani's duties. Approximately two years later, a systems analyst assumed Pardasani's duties. Approximately two years later, a system analyst was hired at a comparable level.

On October 26, 1987, Pardasani filed a second charge with the EEOC, alleging that his termination was in retaliation for his first charge with the EEOC. He then filed suit against Siemens in April 1989. The district judge granted Siemens' Motion to Dismiss on Pardasani's claim for religious

discrimination, defamation, intent
infliction of emotional distress,
violation of 42 U.S.C. 1981.

The case regarding the age,
national origin discrimination
retaliatory termination was tried befo
magistrate judge. At the conclusio
Pardasani's case, his claims of age
race descrimination were dismissed.
trial the court dismissed plaint
remaining claims of national o
discrimination and retaliation finding
the plaintiff failed to make his
facie case. Pardasani appeals only
last dismissal.

III.

Pardasani raises two issues b
this court. First, he argues that
district court erred in focussing on

prima facie case once the defendant ha presented his evidence. Instead, h contends the magistrate judge should hav focused on the ultimate issue o discrimination. Pardasani's secon agrument is that the district court applie the wrong standard for reviewing the claims. According to Pardasani, the district court should have applied the "mixed motive" standard announced in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), instead of the test outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

A. Standard of Review

The clearly erroneous standard applie to the district court's finding or discrimination. See Barnes v. Yellow Freight Sys., 830 F.2d 61, (5th Cir. 1987). This Court must review findings of fact

under the same standard. Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985).

B. The District Court Was Correct to Dismiss Plaintiff's Claims for Failure to Make a Prima Facie Case

Pardasani argues that under United States Postal Service Bd. of Governor v. Aikens, the court should not have focused on the issue of plaintiff's prima facie proof once it heard the case on the merits. In Aikens, the Supreme Court held that when a defendant in a discrimination case loses a motion to dismiss or a motion for directed verdict and then offers evidence of legitimate, nondiscrimnatory reasons, the factfinder must then decide the ultimate issue of discrimination. United Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983). Once the defendant presented his evidence, the

plaintiff's prima facie case is no longer the issue.

The court's initial denial of the motion to dismiss does not preclude a later determination that the plaintiff did not make out a prima facie case after all. In Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970), this Court held that denying a defendant's motion at the end of plaintiff's case is merely a tentative finding that plaintiff met his burden. Id. at 797-98. Denying a motion to dismiss does not preclude the trial judge, at the conclusion from findings and determinations at variance with the prior tentative rulings. Id.

In this case, after receiving defendant Siemens's evidence regarding Pardasani's work performance and termination, the court could correctly find that the Plaintiff failed to prove all the

elements of his prima facie case. Specifically, the court found that Pardasani was not qualified for his position, a necessary element in his prima facie case for national origin discrimination involving his promotion and termination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In addition, evidence supports the court's finding that the plaintiff did not meet his burden of proving that he was replaced by a nonprotected class member. Nobody was promoted to senior analyst and nobody was hired in his position until two years after his termination.

Regarding the claim of retaliatory discharge, the district court correctly found that Pardasani failed to meet the third element of his prima facie case. Pardasani was required to show (1) that he was engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. See McDaniel v. Temple Indep. School District, 770 F.2d 1340, 1346 (5th Cir. 1985); Jack v. Texaco Research Center, 743 F.2d 1129 (5th Cir. 1984). In light of Siemens' evidence regarding the reasons for Pardasani's termination and the history of his performance, the court could find that plaintiff failed to prove any "causal connection" between his filing the EEOC claim and his discharge.

After a discrimination case is fully heard on the merits, the court usually should not address the issue of plaintiff's prima facie case, but instead address the ultimat issue of discrimination. Aikens at 714-15. When, however, a court, upon hearing additional evidence regarding the plaintiff's qualifications and replacements, finds that the plaintiff failed to meet his initial burden, it may vacate an earlier finding and dismiss the case for failure to prove a prima facie case. Here the court correctly dismissed the actions for failure to prove a prima facie case. The record supports the court's findings. They are not clearly erroneous.

C. The Defendant's Behavior Does Not Trigger the "Mixed Motive Test of Price Waterhouse v. Hopkins

In its opinion, the district court

stated that even if Pardasani had established a prima facie case of national origin discrimination or retaliatory discharge, he had failed to show pretext after the defendant's showing of legitimate, nondiscriminatory reasons for the termination and evaluation. Pardasani argues that the court should not have applied the pretext test in McDonnell Douglas, but instead applied that "mixed motive" test announced in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). Because Siemens' behavior does not justify bypassing McDonnell Douglas, the court correctly refused to apply the Price Waterhouse test.

In Price Waterhouse, the Supreme Court held that an employer may still be liable for discrimination if its legitimate reasons for hiring or firing are mixed with nonlegitimate reasons. Id. at 1795. If

the plaintiff can prove that a discriminatory purpose played a part in the defendant's decision, the burden is then upon the defendant to show that the same decision would have been made absent the discriminatory purpose. Id.

It is plaintiff's contention that the district court should have applied this mixed motive standard to find agaisnt Siemens, despite the defendant's evidence of legitimate, nondiscriminatory reasons. This Court has recognized that Price Waterhouse requires a new standard of proof for mixed motive discrimination cases, but it has also recognized, as the Supreme Court did, that not all cases are mixed motive. Some remain pretext cases. See Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989). Before a trial court applies the mixed motive test, it must find that the case involves mixed

motive. Price Waterhouse at 1789 n.12. If the plaintiff does not establish that the discriminatory purpose played a motivating part, then he or she must show pretext. Id.

In Young v. City of Houston, Texas, 906 F.2d 177 (5th Cir. 1990), this Court addressed the proof necessary to show that a mixed motive exists. Citing Price Waterhouse, we held that the employee must show that the employer actually relied on the protected factor when making his decision. Stray remarks regarding stereotypes alone are not sufficient. Id. at 182. In that case statements that Young was a "white token" and "white faggot" did not trigger the mixed motive test. These statements did not rise to the level of racist animus necessary to bypass McDonnell Douglas. Id. at 181.

Pardasani alleges that the statement,

"If I get rid of the minorities out here, I'll be pressed to hire another," allegedly made by McLendon sufficiently demonstrates national origin animus. The district court obviously did not find that this statement sufficed to bypass McDonnell Douglas. The alleged statement does not constitute the level of ethnic animus established in Walsdorf v. Bd. of Commissioners, 857 F.2d 1047 (5th Cir. 1988). Walsdorf affirmed the grant of Title VII relief to a woman who was not promoted. In that case, the supervisor said about the plaintiff, "ain't no bitch going to get this job." The statement in today's case which Pardasani suggest is equal, is not. Therefore, he was required to demonstrate pretext or produce more specific evidence of intentional discrimination under McDonnell Douglas.

D. The District Court Correctly Allowed the Claim Based on National Origin Discrimination to Go Forward

Siemens argues that because Pardasani did not check the box next to national origin on the EEOC charging form, Pardasani is precluded from basing a suit on that claim. The court correctly found that Pardasani's mistake did not bar his claim.

This Court has held that failure to check a box on an EEOC form does not preclude a plaintiff's Title VII claim. See Galvan v. Bexar County, Texas, 785 F.2d 1298 (5th Cir. 1986); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). Siemens had adequate notice regarding Pardasani's EEOC charges and a mere technicality does not preclude Pardasani's bringing this suit.

IV.

The judgment appealed from is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DAYAL PARDASANI,	)	
	)	
	)	
Plaintiff	)	CIVIL ACTION NO.
	)	J89-0246 (L)
V.	)	
	)	
SIEMENS ENERGY AND AUTOMATION, INC.,	)	
	)	
Defendant.	)	
	)	

FINAL JUDGMENT

This action having come on for trial without jury before Honorable Britt Singletary, and the Court having considered all the evidence and rendered its Findings of Fact and Conclusions of Law in this matter on December 3, 1990, it is hereby

ORDERED AND ADJUDGED that the Plaintiff's age, race, national origin, and

retaliation discrimination claims agai
Defendant be, and the same are, her
dismissed with prejudice, with all co
being taxed against the Plaintiff.

SO ORDERED AND ADJUSTED t
17th day of December 1990.

s/Britt Singletary
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DAYAL PARDASANI,	)	
	)	
Plaintiff	)	CIVIL ACTION NO. J89-0246 (L)
V.	)	
SIEMENS ENERGY AND AUTOMATION, INC.,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND

This matter is before the Court as the result of plaintiff, Dayal Pardasani's ("Pardasani" or plaintiff), Second Amended Complaint filed on August 15, 1989, complaining about disparate employment conditions and his termination by

defendant, Siemens Energy & Automation, Inc. ("Siemens" or "Company"), on the basis of his race, national origin, age, religion, and retaliation for filing a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff also complained of alleged defamation and intentional infliction of emotional distress. Pursuant to Defendant's Motion for Summary Judgment, the Court dismissed plaintiff's claims under 42 U.S.C. 1981 and his religious discrimination claims, defamation claims, and claims or intentional infliction of emotion distress by Memorandum Opinion and Order dated June 27, 1990.

Pursuant to the parties' agreement, the parties stipulated to a hearing before and entry of judgment by the undersigned U.S. Magistrae. The trial was conducted on October 10, 11, 12, and 18, 1990.

Following the plaintiff resting his case, defendant moved for a directed verdict and the Court dismissed plaintiff's claims concerning age discrimination and race discrimination on the basis that the plaintiff had presented no credible, material evidence that plaintiff had been discriminated against because of his age or race (as distinguished from his national origin, Indian). Upon consideration of the entire record in this case, the Court hereby affirms its dismissal of plaintiff's race and age discrimination claims.

The plaintiff called seven witnesses who introduced 41 exhibits. Siemens called six witnesses and introduced 69 exhibits. Upon considering the testimony of plaintiff's and defendant's witnesses, including their demeanor and credibility and the relationship of each individual's testimony to that of other witnesses and

exhibits, including logical inferences which can be drawn from them, the Court hereby makes the following findings:

II

FINDINGS OF FACT

Mr. Pardasani was hired by Siemens on November 23, 1981 as a system analyst. Siemens considered his job performance satisfactory through early 1986. From 1982 through 1985, Pardasani received favorable annual evaluations on his performance from his supervisor, the Manager of Information Systems, Norm Smith.

The Information Systems Department (herein referred to as "the Data Processing Department") did not actually produce products sold by Siemens, but provided data processing services to all of the departments in Siemens' Jackson facility. Siemens' Jackson facility employs approximately 575 employees engaged in the

assembly and manufacture of large electricial and electromechanical devices such as transformers and related electrical disribution equipment for utility companies.

As a systems analyst, Mr. Pardasani's job involved receiving assignments from his departmental supervisor (herein referred to as the "Data Processing Manager"). Specifically, when a user of data processsing services in another department requested that an existing computer program be changed or a new program written to perform certain functions relating to their department's acitivities, it was Mr. Pardasani's responsibilty to understand the user's "concept" concerning what the user wanted to accomplish with a computer program, and to transform that concept into logical computer language so as to creat a new program or modify an existing program

to acnieve the user's objectives.

In early 1986, Siemens became dissatisfied with the Data Processing Mangaer's operaion of the Data Processing Department as well as his job performance. Data Processing Manager Smith was given the option of either resigning or being terminated; Mr. Smith elected to resign. Around July, 1986, senior systems analyst Tom McLendon, the most senior employee in the Data Processing Department, became Acting Data Processing Manager at least with respect to the "applications" side of the department as distinguished from the "systems" side. McLendon reported to Controller Bod Steil.

While Acting Data Processing Manager McLendon and plaintiff had worked togethr effectively for years, they had what the plaintiff characterized as a "sour" personal relationship.

Acting Data Processing Manager McLendon was advised that as part of his duties, he must conduct Pardasani's annual evaluation which was due October, 1986. Mr. McLendon protested that he had not worked with Mr. Pardasani long enough in a supervisory capacity to effectively evaluate his work. Nevertheless, Controller Steil advised him that he must evaluate the plaintiff. To do so, McLendon solicited user comments concerning the quality of Pardasani's work. User comments were reveived by the Acting Data Processing Manager from Manager of Production Control Charles Herrington, Supervisor of Drafting Paul Gardner, Accounts Payable Supervisor Debbie Jackson and Accounting Manager Al Woelfle, who formally judged plaintiff's performance to be unsatisfactory and especially unacceptable relative to his status as the most senior system analyst.

Based upon these user comments, Acting Data Processing Manager McLendon completed his portion of the written evaluation around October 1, 1986 and met with plaintiff to discuss it. Plaintiff told McLendon, that he would not accept his unsatisfactory rating of 2.3 on a 5-point scale since he considered the evaluation to be unfair. As a result of the unfavorable evaluation, Mr. Pardasani received no raise in 1986-87. Pardasani attributed the user's complaints concerning his work to incorrect instructions from the users or incorrect use of his completed programs by them.

On December 1, 1986, Pardasani wrote a leter to Employee & Community Relations Manager Micheal Goryl complaining of the evaluation. On December 16, 1986, Mr Goryl met with Mr. McLendon and Mr. Pardasani concerning his evaluation. Mr. Pardasani explained the reasons why he felt the

evaluation was unfair and McLendon, who had been promoted to Data Processing Manager on November 1, 1986, explained the reasons for his low evaluation. When Mr. Pardasani and Mr. McLendon were unable to agree to any changes in the evaulation, Employee and Community Relations Manager Goryl advised Mr. Pardasani that he could not change the evaluation since it was the Data Processing Manager's responsibility to complete it. Mr. Goryl added that he had been a user of Mr. Pardasani's services and had found them unsatisfactory, also. Mr. Goryl's dissatisfaction was apparently the result of Mr. Pardasani's work on a pension program project in which the Employee & Community Relations Department encountered numerous problems which were reported to Mr. Goryl by Personnel Assistant John Lee, a black male, who was also dissatisfied with Mr. Pardasani's performance.

In early February, 1987, Mr. Pardasani was notified that his father, who resided in India, had died. Mr. Pardasani requested a leave of absence in order to return to India to tend to his family's affairs, and it was granted. Mr. Pardasani did not return from his leave of absence for over three weeks. Plaintiff did not have sufficient accured leave to be paid for the entire period; however, on Data Processing Manager McLendon's recommendation, Siemens approved payment of full salary for the additional time off that plaintiff did not have sufficient accrued leave to cover. Additionally, the plaintiff was absent an additional two and one-half days during this period and was delayed in coming to work for several hours during certain days. Data Processing Manager McLendon recommended and the Company approved payment of his full salary

for these perioids. Additionally, Mr. McLendon recommended and Siemens approved payment of $1,000 advance, in addition to plaintiff's salary, in order that Mr. Pardasani could purchase the airline ticket necessary for his trip to India. Mr. McLendon was also involved in taking up a collection among data processing employees to assist Mr. Pardasani.

On May 29, 1987, Pardasani filed a charge with the Equal Employment Opportunity Commission alleging that he had been discriminatorily denied a fair evaluation and promotion to senior system analyst on the basis of his race, age and religion. While Mr. Pardasani alleges that he was discriminatorily denied a promotion to a senior system analyst position around January, 1987, he concedes that no one was ever promoted to that position and the only person who ever held the position of senior

systems analyst was Mr. McLendon. The uncontroverted testimony of Company witnesses established that Siemens' officials made the decision not to fill the position in order to save money and the functions of the position were absorbed by Data Processing Manager McLendon, the previous incumbent, and other system analysts.

Subsequent to plaintiff's 1986 performance evaluation and his meeting regarding the evaluation with Tom McLendon and Mike Goryl, plaintiff's work performance continued to decline. From January, 1987, through mid-September, 1987, Data Processing Manager McLendon continued to note performance problems and user complaints as shown in numerous memoranda from Mr. Pardasani's departmental and personnel files. However, plaintiff's performance problems were not serious

enough to require consultation by Data Processing Manager McLendon with Mr. Pardasani.

Around August, 1987, Data Processing Manager McLendon was advised of the results of a Price Waterhouse auditor's report concerning Data Processing Department operations. The Price Waterhouse report recommended implementation of a security system to prevent more than one computer programmer/analyst working on the same program at the same time (frequently without knowledge of the other programmer). Previously this practice had resulted in changes being made to a program which were unknown to the other programmer. The Price Waterhouse report also recommended restricting access to ICCF libraries (the actual location in the computer where the progarmmer/analyst would work on changing programs or creating new ones).

Data Processing Manager McLendon placed Data Processing System Supervisor Dane Truhett in charge of writing the security system program. Dane Truhett solicited the ideas of all data processing employees concerning the security system. With McLendon's approval, Truhett implemented the security system around September 21, 1987, although cosmetic refinements were made and bugs were eliminated from the system for the next several weeks.

During this time period, McLendon directed Truhett to implement ICCF library restriction rules which limited eachf programmer/analyst to no more than eight (8) of 99 libraries. Around September 23, 1987, the plaintiff learned that systems analyst Mark Anderson had access to more than eight (8) libraries. On September 25, 1987, Mr. Pardasani wrote a letter to Mr.

Goryl complaining about McLendon's unfair treatment of him by giving Anderson access to more than eight (8) libraries. However, when McLendon and Truhett became aware of Mark Anderson's additional access to ICCF libraries, on or about September 25, McLendon directed Truhett to immediately correct the problem, which he did. Accordingly, the evidence establishes that Mark Anderson's additional ICCF library access compared to that of other programmer/anayst lasted for only two days and was the result of an oversight by Dane Truhett. Also, the evidence indicates that Anderson never used his additional access to violate the security rules.

Around September 21, 1987, Mr. Pardasani was assigned the task of making certain changes to a tag print program. Pardasani estimated that the amount of time required to complete the project should be

two weeks. However, at the end of two weeks he had not completed the project and requested an additional week. At the end of the additional week his work remained incomplete and he requested an additional three days. Again, McLendon granted him additional time. However, notwithstanding the additional time, plaintiff's work on the project was not completed.

During this period, the plaintiff alleges that he was not able to work on the project because of the implementation of the security system and the ICCF library rules. The plaintiff claims that he had to violate the security rules in order to work on the project. Despite these difficulties, the plaintiff claims that on October 19 he had completed all changes in the tag print program and performed most of the necessary testing of other witnesses.

The plaintiff's testimony and

testimony of other witnesses, especially Dane Truhett and Mark Anderson, contradict his assertions. While the plaintiff testified that he was denied access to the proper commands and tools necessary to make changes in the tag print program at other points he testified that he had completed all necessary changes and was completing the testing phase on October 19, 1987. System analyst Anderson testified that all data processing programmer/analyst knew the security rules, knew the ICCF library restrictions, and had access to all information and tools necessary to perform their job functions. Data Processing Systems Supervisor Truhett testified that he received a telephone call from Dayal Pardasani on Saturday, October 17, 1987 at his home and Pardasani requested that Truhett provide him information to circumvent the security system in working

on the tag print program. Truhett advi
Pardasani that he did not have
authority to do that, but advised him
call Data Processing Manager McLendon
authorization. Pardasani concedes that
never called McLendon for authorization
assistance. Truhett testified that whi
he could not condone violating department
rules concerning the security system,
was available to provide Pardasani with a
information he needed in order to work
his project. The following Monday, Truhe
took over the tag print program project
McLendon's request and contary
Pardasani's testimony, found that the wo
had not progressed to the point represent
by Pardasani, but that completion of t
project requiared much time and effort ov
parts of the next six work days. Truhe
testified, however, that he was able
complete the project without violating

security system.

As the result of Pardasani's failure to complete the project, on October 19, 1987, McLendon requested information, including the location of the information in ICCF libraries. Pardasani refused to do so. McLendon then went to Employee & Community Relations Manager Goryl's office and spoke with Goryl and Controller Steil who was also present. With Steil's concurrence, Goryl advised McLendon to return to the Data Processing Department, call Pardasani into McLendon's office, make the same request a third time and, if Pardasani did not turn over the information, make the same request a fourth time coupled with the threat of immediate termination for failure to comply with the Data Processing Manager's order. Although Pardasani once again refused to provide the requested information, upon

being advised of the consequences for another refusal. Pardasani agreed to turn over the requested information. Pardasani then gave the information to McLendon, and left him with the understanding that he had received all of the information concerning the tag print program project.

Later that day, McLendon received a written statement from Pardasani advising him of additional information needed to finish the tag print program project. Upon receipt of this information, McLendon met with Employee and Community Relations Manager Goryl advising him that he had lost confidence in Pardasani and feared for the security of the data processing information in the department. He recommended to Mr. Goryl that Pardasani either be transferred out of the department or terminated.

Mr. Goryl spoke with several corporate

officials concerning the situation, including Controller Steil, acting General Manager Jim Malia, Associate General Counsel Mike Williamson, Manager of Industrial Relations Bruce Petterson at Siemens' headquarters in Atlanta, Georgia, and other corporate officials. Goryl decided that Pardasani should be terminated on the basis of insubordinate conduct and unsatisfactory job performance. Siemens' officials uniformly concurred in Mr. Goryl's decision. Goryl prepared a letter of termination which Mr. McLendon signed. Mr. Pardasani was terminated on October 23, 1987.

On October 26, 1987 Pardasani filed a second charge with the Equal Employment Opportunity Commission alleging his termination was retaliation for filing his May 29, 1987 charge of race, age and religious discrimination.

Plaintiff claims that statements by McLendon show animus against him because he is a member of a minority group, i.e., Indian. However, Mr. McLendon's comments are alleged to have been made by Mr. McLendon at a time when he was not a management representative. None of these comments were directed to Mr. Pardasani individually, and none were the subject of a complaint by Mr. Pardasani to Siemens.

Mr. Pardasani claims that certain racial jokes or remarks demonstrated national origin animus against him. However, the racial, remarks/jokes referred to by Mr. Pardasani and certain witnesses did not involve Indians and generally were made at a time when Mr. McLendon was not a management representative. Further, black witnesses, John Lee and Nathan Slater, testified that they considered Tom McLendon a friend and, although neither are

presently employed by Siemens', they continue to enjoy a personal social relationship with him. Additionally, all witnesses testified that the racial remarks were made in the context of jokes among friends and that the plaintiff was neither the object of nor a participant in the remarks/jokes.

With respect to the plaintiff's job performance, four witnesses, Manager of Production Control Herrington, Accounting Manager Al Woelfle, Accounts Payable Supervisor Jackson and Supervisor of Drafting Paul Gardner, testified as to plaintiff's continuing unsatisfactory job performance through his date of termination. Indeed, the plaintiff's own witnesses, Data Processing Systems Supervisor Truhett, Systems Analyst Anderson and Systems Analyst Slater testified that Pardasani's job performance

was unsatisfactory and/or he was the worst system analyst in the department in 1986-87 even though he was the most senior analyst.

Following his termination, the plaintiff's duties were assumed by Data Processing Manager McLendon and other systems analysts. Approximately two years later, a systems analyst was hired at a comparable level.

III.

CONCLUSIONS OF LAW CONCERNING PLAINTIFF'S CLAIMS

A. Discriminatory Evaluation Claim

Plaintiff alleges disparate treatment. The burden of proof in disparate treatment cases is set forth by the United States Supreme Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The plaintiff bears the burden of presenting a prima facie case of

discrimination. Once a prima facie case is established, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the alleged adverse treatment. Once the defendant articulates a legitimate non-discriminatory reason, the plaintiff bears the burden of proving the articulated reason is a pretext for discrimination. At all times, the plaintiff bears the burden of proving, by a preponderance of evidence, that he was a victim of intentional discrimination.

To establish a prima facie case of national origin discrimination, plaintiff must show: (1) that he was a minority group member; (2) that he was qualified to receive a better evaluation; (3) that he suffered adverse treatment; and (4) after receiving adverse evaluation, the employer gave a better evaluation to a non-minority

group member who had performed similar work or engaged in similar conduct as that which caused plaintiff's low evaluation. See Davin v. Delta Airlines, 678 F.2d 567 (5th Cir. 1982); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Assuming the plaintiff established a prima facie case, the defendant articulated a legitimate non-discriminatory reason for the plaintiff's low rating--it was based upon the user's comments. Plaintiff presented no evidence that user's comments were a pretext for intentional discrimination. Indeed, the plaintiff stated that he was on good terms with all of the Siemens' representatiaves who testified about his unsatisfactory work performance and Mr. Pardasani conceded that they had not discriminated against him.

B. Failure to Promote Claim

Plaintiff presented no facts to

support his claim that Siemens failed to promote him to Senior Systems analyst because of his national origin and therefore, failed to establish a prima facie case of discrimination. There is no evidence that there was ever any vacancy by which he could have suffered an adverse personnel action. There is no evidence that any non-minority was ever promoted to Senior System Analyst. Clearly, the Plaintiff cannot meet the second, third, and fourth elements necessary to establish a prima facie case." See Davi v. Delta Airlines, supra; McDonnell Douglas Corp. v. Green, supra.

C. The Plaintiff's Termination

In order to establish a prima facie case of national origin discrimination concerning his termination, the plaintiff must show: (1) that he waqs a minority group member; (2) that he qualified for the job; (3) that

he was discharged; and (4) after his discharge, the employer either hired a non-minority group member to replace him or retained to a non-minority group member who had engaged in conduct similar to that which caused the plaintiff's termination. Davin v. Delta Airlines, supra; McDonnell Douglas Corp v. Green, supra. The plaintiff failed to established the second and fourth elements of his prima facie case. Although the plaintiff insists that he was qualifed for his job, Siemens found his performance, behavior and attitude, including insubordinate conduct, unacceptable. Mr. Pardasani's opinion of job performance is based exclusively upon his own perception. Indeed, his perception of satisfactory job performance during 1986-87 was not even shared by his own witnesses. However, the uncontroverted testimony of Siemens' witnesses was that

they considered his job performance unacceptable. At the time of his termination, plaintiff was not performing his job at a level which met Siemens' legitimate expectations. Elliott v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir. 1983); Kephardt v. Institute of Gas Technology, 630 F.2d 1217, 1219 (7th Cir. 1980), cert. denied 450 U.S. (1981).

Additionally, the plaintiff was not replaced at the time of his termination. Mr. Pardasani presented no evidence that any other employee, especially a non-minority employee, violated security rules, was insubordinate, did not timely finish projects, was considered to have unacceptable job performance and was retained while the plaintiff was terminated. Indeed, plaintiff failed to present any evidence of a non-minority

employee receiving better treatment under similar circumstances, while the defendant presented substantial evidence that Company policies were enforced, and that both minority and non-minority employees violating company policies were terminated.

The plaintiff's case concerning his termination appears to be premised on the theory that he was discharged for not completing the tag print program on October 19, 1987. Since the plaintiff alleges that he was discriminatorily denied the tools necessary to complete the project was discriminatory. However, the uncontroverted testimony of Company witnesses establishes that the immediate cause of termination was plaintiff's insubordinate refusal to turn over requested project information on October 19, coupled with his subsequent release of additional information which was supposed

to have been furnished previously that same day.

The testimony of plaintiff's witnesses, Dane Truhett, Mark Anderson, and Nathan Slater, contradicts plaintiff's claims that he was discriminatorily denied access to tools and commands needed to complete the tag print program project. Even assuming plaintiff established a prima facie case of discrimination, defendant's assertion that the immediate reason for termination was plaintiff's insubordinate conduct coupled with Data Processing Manager McLendon's loss of confidence in him constitute legitimate, lawful reason for his discharge. Plaintiff has failed to produce any evidence indicating that defendnat's proffered and immediate reason for discharge was a pretext for discrimination.

D. Retaliatory Discharge Claim

In addition to his national origin claim, plaintiff asserts that he was discharged in retaliation for filing a May 29, 1987 charge of discrimination with the EEOC.

To establish a prima facie case of unlawful retaliation, plaintiff must show: (1) that he was engaged in an activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a casual connection between the particiaption in the protected activity and the adverse employment decision. McDaniel v. Temple Independent School District, 770 F.2d 1340, 1346 (5th Cir. 1985); Jack v. Texaco Research Center, 743 F.2d 1129 (%th Cir. 1984); McMillan v. Rust College, Inc. 710 F.2d 1112 (5th Cir. 1983).

The plaintiff 's evidence does not establish a prima facie case because it does not show a "casual connection" between

his May 29 1987 EEOC charge and his October 23, 1987 termination. Apparently, plaintiff's employment continued without incident at the time he filed his first EEOC charge until mid-September, 1987. While the plaintiff testified that he believed Data Processing Manager McLendon denied him the opportunity to attend educational programs during this period, plantiff failed to identify any educational programs conducted in the Data Processing Department from which he was excluded. Employee & Community Relations Manager Goryl testified without contradiction that the plaintiff made no request to use the company's educational assistance program during this period although he had used it in the past.

While plaintiff apparently claims that he began having notes put in his personnel file after he filed his EEOC charge, this

argument is refuted by the evidence showing that such notes were placed in his file both before and after he filed the charge.

Assuming the plaintiff established a prima facie case of retaliatory discharge, the plaintiff failed to establish that retaliation, rather than insubordination, was the immediate cause for termination. "Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that 'but for' the protected activity (he) would not have been subjected to the action of which (he) claims. If the employee does not bear that burden of persuasion, (he) may not prevail. "Jack v. Texaco Research Center, 743 f.2d at 1131; McDaniel v. Temple Independent School District, supra; Smalley v. City of Eatonville, 640 F2d, 765,769 (5th Cir. 1981).

Defendant articulated legitimate non-

Court hereby dismisses plaintiff's remaining claims of national origin and retaliation discrimination against defendant with all cost being taxed against the plaintiff.

ORDER AND ADJUDGED this the 3rd day of December, 1990.

s/Britt Singletary
UNITED STATES MAGISTRATE

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DAYAL PARDASANI PLAINTIFF

VS. CIVIL ACTION NO. J89-0246(L)

SIEMENS ENERGY AND AUTOMATION, INC. DEFENDANT

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Siemens Energy and Automation, Inc. (Siemens) to dismiss or, in the alternative, for summary judgment pursuant to Federal rules of Civil Procedure 12 (b) (6) and 56, respectively. Plaintiff Dayal Pardasani has responsed to the motion. The court has considered the memoranda of authorities together with attachments submitted by the parties and is of the opinion that the motion should be granted in part and denied in part.

In his complaint, plaintiff alleges the following: That he, a lawfully admitted resident alien, native of India, who is presently 49 years of age, was hired by Siemens in 1981 as a systems analyst. He initially enjoyed a pleasant employment relationship and was considered to have performed satisfactorily. However, in 1986, after Tommy McLendon became manager of the Data Processing Department at Siemens, plaintiff became the object of harassment and derogatory comments by McLendon, and was wrongfully subjected to unfounded complaints, unfavorable evaluations and unreasonable work assignments, and was denied promotions, salary increases and the opportunity to advance in his employment. Because of this treatment, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in May of

1987. Ultimately, on October 23, 1987, plaintiff was wrongfully terminated from his employment.

Following his discharge, plaintiff brought the present action asserting a number of claims against Siemens, including claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-e17, that Siemens had discriminated against him on the basis of his national origin or race, and religion, and had engaged in retaliatory discrimination by its treatment of him and its discharge of him from employment. He also charged age discrimination pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621-634, and alleged a violation of 42 U.S.C. 1981 based, at least in part, on defendant's alleged failure to promote him. Additionally, plaintiff appended state law claims of intentional

infliction of emotional distress and defamation. Siemens has now moved to dismiss, or for summary judgment, as to each of the causes of action attempted to be asserted by plaintiff.

National Origin Discrimination

Siemens argues that Plaintiff cannot recover on his claim that he was discriminated against on the basis of his national origin for the reason that the allegation of national origin discrimination was not the subject of a timely charge with the EEOC. On the EEOC charging form, plaintiff, who was acting pro se, did not mark the box next to "National Origin," but he did state in his charge that he believed he had been discriminated against on the basis of his "race (Indian)" and "religion (Hindu)." In the court's view, plaintiff sufficiently placed defendant on notice of his claim

that he had been discriminated against "on the basis of his membership in a group that is commonly perceived to be racial because it is ethnically and physiognomicall (distinct)." Saint Francis College v. Al-Khazraji, 481 U.S.604, 613 (1987); Jatoi v. Hurst-Euless-Bedford Hospital Auth., 807 F.2d 1214, 1218 (5th Cir. 1987), and accordingly, the court concludes that the plaintiff's failure to strictly comply with the mechanics of filing his charge, i.e., his failure to check the appropriate box, should not deprive him of this forum. See Galvan v. Bexar County, Texas, 785 F.2d 1298 (5th Cir. 1986) (employer who was fully aware of issues before EEOC was not prejudiced by age discrimination claim before district court); See Also Zipes v. Trans World Airlines, 455 U.S. 385, 393, (1982) (filing of timely EEOC charge not jurisdictional prerequisite to suit but

rather requirement subject to waiver, estoppel and equitable tolling).

U.S.C. 1981

Siemens seeks dismissal of plaintiff's section 1981 claim on the basis that such claim is now precluded by the Supreme Court's recent ruling in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). In Patterson, the court held that section 1981 does not prohibit racial employment discrimination in general, but only discrimination with respect to the "making and enforcing" of employment contracts. Defendant argues that since plaintiff has alleged no racial discrimination with respect to his making or enforcing a contract with Siemens, he has stated no claim under section 1981. In response to this contention, plaintiff asserts that he has stated a claim under section 1981 since he has charged that he

was denied promotion and advancement during his employment with defendant. In Patterson, the Court observed that

> the question whether a promotion claim is actionable under 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the new contract is actionable under 1981. ... Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under 1981.

Patterson, 109 S. Ct. 2377 (emphasis supplied). In the case at bar, neither plaintiff's complaint nor his response to defendant's motion suggests the nature of any promotion or promotions that are claimed to have been discriminatorily denied him. That is, he has failed to allege facts which would indicate that the promotion would have resulted in a new contract, a "new and distinct relation,"

between him and the defendant. Thus, th court concludes that pursuant to th Court's holding in Patterson, plaintiff ha failed to state a claim which is cognizabl under Section 1981. See Gregg v. Hillma Distributing Co., 719 F. Supp. 552, 55 (S.D. Tex 1989) (plaintiff's factuall unsupported conclusory allegations that ne position would constitute new and distinc employment relationship held insufficien to state section 1981 claim in light o Patterson).

Intentional Infliction of Emotion Distress

Plaintiff charges that the defendant' actions of intentionally and continuousl denying him access to the tools necessar for the performance of his job and the terminating him for, in part, no performing his job, caused him to suffe extreme emotional distress. Defendant ha moved to dismiss plaintiff's emotiona

distress claims on the grounds that (1) plaintiff cannot present sufficient evidence to support such a claim, (2) the claim is an attempt to evade Mississippi's at-will employment doctrine, (3) plaintiff's sole and exclusive remedy lies under the provisions of the Mississippi Worker's Compensation Act, and (4) the claim is time-barred by Mississippi's one-year statute of limitations. Pretermitting consideration of the first three bases for dismissal, the court concludes that plaintiff's emotional distress claim is indeed time-barred. Under Mississippi law, intentional infliction of emotional distress claims are governed by the one-year statute of limitation contained in Miss. Code Ann. 15-1-35 (Supp. 1989). Guthrie v. J.C. Penny Co., 803 F.2d 202 (5th Cir. 1986). Plaintiff's employment was terminated on October 23, 1987; the

present action was filed June 7, 1989, over a year and a half later. The claim is, therefore, time-barred.

Defamation

Defendant avers entitlement to judgment on plaintiff's cause of action for defamation since the claim is without factual basis. Plaintiff has alleged in his complaint that since his discharge from Siemens, his quest for other employment has been fruitless and it is his "belief" that his lack of success is attributable to defendant's having made false and defamatory statements about him to his prospective employers. He also "believes" that defendant has wrongfully disclosed to prospective employers that plaintiff has filed charges against Siemens with the EEOC. To prevail on a claim for defamation, the plaintiff must prove, inter alia, that there was an unpriviledged

publication to a third party of false and defamatory statements concerning the plaintiff. Blake v. Gannett Co., 529 So. 2d 595, 602 (Miss. 1988). In the case sub judice, plaintiff has presented no evidence to establish that defendant published any statement to anyone concerning him. In his deposition, plaintiff merely reiterated his belief that the defendant must have defamed him: otherwise, he would have secured other employment:

> Q. Do you specifically know of any prospective employer that called Siemens?
>
> A. No. I don't think anybody will admit that they called and got bad reference, that's why they not giving, you know....
>
> Q. Now what leads you to believe that Siemens has given you some sort of bad reference?
>
> A. You just have a - when you go for interview you get a kind of a feel of what kind of response you are getting. And all of a sudden it turns bad. I feel like they somehow found out or either

they found out or either they called Siemens.

Q. Do you have any facts that su that claim, that is, do you h of any facts indicating that that Siemens officials have disclosed any information tha Siemens officals have disclos any information concerning th circumstances of your termina

A. No, I don't have.

It is clear from Plaintiff's testimony he has no proof that the defendant defamed him but rather merely specu that the defendant must have done so. subjective belief, unsupported by evidence. is insufficient to with defendant's motion for summary judgmen

Religious Discrimination

Any employee establishes a prima case of religious discrimination by sh that he (1) has a bona fide rel belief that conflicts with an empl requirement; (2) informed his emplo this belief; and (3) was disciplined

failure to comply with the conflicting employment requirement. Jenkins v. State of Louisiana, 874 F.2d 992, 995 (5th Cir. 1989), cert. denied, 110 S. Ct. 871 (1990). Plaintiff has identified no religious belief or practice that conflicted with his job requirements, nor has he suggested that he ever inform anyone at Siemens about any such belief or practice. Moreover, while plaintiff appears to claim that he was subjected to harassment and derogatory comments for a variety of reasons including his religion, the record does not reveal that anything was ever said by anyone about plaintiff's religion. In fact, in his deposition, plaintiff testified that Tommy McLendon, the individual alleged by plaintiff to have been responsible for the harrassment and derogatory comments, knew nothing about plaintiff's religion. Under these circumstances, plaintiff's charge of

discrimination based on religion cannot succeed.

Retaliation, Race (National Origin) and Age Discrimination

In the court's opinion, plaintiff has presented sufficient evidence to withstand defenant's motion for summary judgment as it relates to the claims of retaliation and national origin and age discrimination.

Based on the foregoing, it is ordered that defendant's motion is granted as to plaintiff's claims for intentional infliction of emotional distress and defamation. The remainder of the the motion is denied.

ORDERED this 27th day of June, 1990.

UNITED STATES DISTRICT JUDGE

U.S. EQUAL EMPLOYMENT OPPTURNTIY
COMMISSION
Washington, D.C. 20507

TO: Dayal Pardasani
858 Lawrence Rd.
Jackson, MS 39206

February 1, 1989
Charge Number:
131871056

Dayal Pardasani
Charging Party

Siemens Energy
& Automation
Respondent

DETERMINATION ON REVIEW AND DISMISSAL OF TITLE VII/ADEA CHARGE

The Commission has reviewed the investigation of this charge of employment discrimination and all supplemental information furnished. In the Request for Review, Charging Party names several witnesses. However, based on the evidence obtained during the investigation which supports Respondent's non-discriminatory reasons for its actions, we have concluded that further investigation, including witness testimony suggested by Charging

Party, is not warranted. We, therefore, agree with the determination issued by our field office and hereby issue a final determination that the evidence obtained during the investigation does not establish a violation of the statutes. Therefore, the Commission dismisses and terminates its administrative processing of this charge.

As the charge alleged, in part, an Age Discrimination in Employment Act (ADEA) violation, the Charging Party may have a right to sue under the statute. ADEA lawsuits must be brought within two years of the occurrence of the alleged discrimination (three years in cases of willful violation).

As the charge also alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a

private action in Federal District Court against the Respondent (s) named above within 90 days of receipt of this Determination. IF CHARGING PARTY DECIDES TO SUE UNDER TITLE VII, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST.

On Behalf of the Commission

Leonora L. Guarraia
Director
Determinations Review Program

Enclosure: Information Sheet on Filing Suit in Federal District Court

cc: Henrene P. Matthews - Director
Jackson Area Office

Thomas Gibbons - Acting Director
Birmingham District Office

JACKSON AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dr. A. H. McCoy's Federal Bldg
100 West Capitol St. Suite 721
Jackson, Mississippi 39269
Phone (601) 965-4537

Certified Mail P962 282 601

Charge No. 131-87-1056

Dayal Pardasani
858 Lawrence Road
Jackson, MS 39206 Charging Party

Siemens Energy & Automation, Inc.
P.O. Box 6289
Jackson, MS 39308

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended and under the Age Discrimination in Employment Act (ADEA).

all requirements for coverage have been met. Charging Party alleged s)he was discriminated against in violation of Title VII and the ADEA in that he was denied promotion, and was issued an unfair performance rating which resulted in his not receiving a wage increase because of his race (Indian), religion (Hindu) and age (47).

Examination of the evidence indicates that Charging Party was hired by Respondent on November 23, 1981, as a system analyst in the Data Processing Department. He was employed in this capacity at the time of the charge. With respect to the promotion allegation, available information shows that the subject vacancy, to which Charging Party aspired and which was created by the promotion of a senior systems analyst to department manager, had not been filled at

the time of the subject charge.

With respect to the performance review/wage allegation, available information shows that for the first four years of Charging Party's employment, he was considered a satisfactory performer by Respondent's former department manager. However, on Charging Party's first performance review by the new department manager, Charging Party's former co-worker, he received a below average rating. As a result, for the first time during his employment, Charging Party failed to receive an annual wage increase, in accord with Respondent's perfomance review/salary range schedule.

Although testimonial evidence reflects that there was animosity and conflict between Charging Party and the departmental manager, even before he became Charging Party's supervisor, evidence is

insufficient to show that below average review and lack of wage increase was due to the relationship between the two or was based on Charging Paty's race, religion or age. Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

This determination does not conclude the processing of this charge. If the Charging Party wishes to have this determination reviewed, (s)he may file a request for review by completing the enclosed Request for Review form and sending it to the Determinations Review Program, Office of Progarm Operations, EEOC, 2401 E Street, N.W., Washington, D.C. 20507. It is recommended that some proof of mailing, such as certified mail receipt, be secured. The request must be personally delivered or

mailed (postmarked) on or before JULY 14 1988.

If the Charging Party submits a timely request for review by the date shown above, the Commission will review this determination. Upon completion of the review, the Charging Party and Respondent will be issued a final determination which will contain the results of the review and what further action, if any, the Commission may take. The final determination will also give notice, as appropriate, of the Charging Party's right to sue.

If the Charging Party does not request a review of this determination by JULY 14 1988. this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only

notice of the Charging Party's right to sue which will be sent by the Commission.) FOLLOWING DISMISSAL, THE CHARGING PARTY MAY PURSUE THE TITLE VII ISSUE(S) BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a Title VII suit is not filed by OCTOBER 12, 1988 the Charging Party's right to sue will be lost.

If the Charging Pary wishes to pursue his/her claim in court under the ADEA or the EPA, the lawsuit must be brought within two years of the alleged discriminatory act (three years in cases of willful violations). Please be advised that Charging Party's ADEA or EPA lawsuit must be brought within these timeframes whether or not (s)he requests a review of this

determination.

On Behalf of the Commission

Henrene Matthews, Area Director

Enclosures:
Request for Review Form
Information Sheet on Filing Suit in Federal Court

NOTICE TO ATTORNEYS: The Commission's regulations governing no cause determination are printed in Title 29 Code of Federal Regulations, Section 1601.19

JACKSON AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dr. A. H. McCoy's Federal Bldg
100 West Capitol St. Suite 721
Jackson, Mississippi 39269
Phone (601) 965-4537

Certified Mail P962 232 601

Charge No. 131-87-1056

Dayal Pardasani
858 Lawrence Road
Jackson, MS 39206 Charging Party

Siemens Energy & Automation, Inc.
P.O. Box 6289
Jackson, MS 39308

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met. The Charging Party, a 48 year old

East Indian. was hired by the Respondent on November 23, 1984, as a Systems Analyst in Data Processing. Charging Pary received satisfactory performance appraisals until November of 1986. It was this unsatisfactory performance appraisal which prompted Charging Party's initial charge of May 29, 1987.

Respondent maintains that following the unsatisfactory appraisal, Charging Party's job performance steadily declined. Respondent further maintains that Charging Party violated the company's security rules and management's directions regarding Interactive Commissions Control Facility libray rules and was insubordinate to his supervisor. These things, according to Respondent, caused his discharge.

Section 704 (a) of Title VII states in pertinent part: It shall be an unlawful

employment practice for an employer to discrimiante against any employees because he has opposed any practice made an unlawful practice by this title or because he has made a charge under this title. Both the Commission and the courts have interpreted this section to provide broad protection for protection of discriminatory dent practices.

Timing is frequently a crucial factual question in the analysis of Section 704 charges. Even though an employee's job performance may have previously been poor or he may have committted some other violation, a charge of protest of discrimination may be the "straw" that breaks a camel's back. Evidence of intent or motive must frequently be highly circumstatial.

The following factors lead us to conclude

that the filing of the May 29, 1987, charge and subsequent oppositions to practices he reasonably believed to have been unlawful under Title VII were at least factors in Charging Party had received a protested unsatisfactory performance appraisal in late 1986. and Respondent cites instances of declining performance, no specific warnings or written memoralizations of the alleged problems occurred. The record is nebulous as to Charging Party's performance between the time of his initial charge and his discharge.

Available information shows that Charging Party began to complain in writing of disparte treatment and discrimination to his supervisor and other managment personnel on September 25, 1987. In subsequent correspondence dated October 14, and October19, he complained of being

denied equal opportunities as a white counterpart and being shown less favorable treatment in access to the department's security system. Finally on October 22, 1987, Charging Party wrote to Respondent's General Manager (noting that he was sending a copy to EEOC) complaining and protesting injustice in the department as he was being denied computer time and necessary tools to complete his work. Charging Prty was discharge the following day, October 23, 1987.

Although Charging Party acknowledges violating the rules, to some extent, available information tends to support his claim that the violation as well as the alleged insubordinate act was a desperate attempt on his part to try and counter and protest what he felt was a deliberate continual attempt to discredit him and his

work. following his first charge. There i
no claim or evidence that Respondent'
Managmetn acknowledged or investigated an
of the written protest or complaints b
Charging Party. While the discharge ma
very well have been justifiable unde
normal conditions, the questionabl
circumstances involved and the timin
nonetheless begs a conclusion that Chargin
Party's discharge consitituted at least
technical violation of Section 704 (a).

Having determined that ther is reasonabl
cause to believe that the charge is true
the Commission no invites the parties t
join with it in a collective effort towar
a just resolution of the matter. A "Notic
of Conciliation Process" is attached fo
your information; a representative of th
Commission will contact each party in th
near future to begin the conciliatio

process.

On Behalf of the Commission

1/18/89 Henrene Matthews
Area Director

Attachment: 1, Notice of Conciliation Process

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(Conciliation Failure)

To: Dayal Pardasani
858 Lawrence Road
Jackson, Mississippi

From: U.S. Equal Employment Opportunity Commission
Birmingham District Office
2121 8th Avenue, North
Suite 824
Birmingham, Alabama 35203

Charge Number
131-88-0095

EEOC Representative
Jerome C. Rose, Regional Attorney

Telephone Number
(203) 731-0795

(See Section 706(f)(1) and (f)(3) of th
Civil Rights of 1964 on reverse of thi
form.)

The Commission has found reasonable caus
to believe that your charge of employmen
discrimination is true but not entered int
a conciliation agreement to which you ar
a party because attempts to achieve such

voluntary settlement with the respondent(s) have been unsuccessful.

The Commission has determined that it will not bring a civil action against the respondent(s) and accordingly is issuing this Notice of Right to Sue. With the Issuance of this Notice the Commission terminates it processing of your charge, except that the Commission may seek status as Inervenor if you decide to sue on your won behalf as described below.

If you want to pursue your charge further, you have the right to sue the respondent (s) named in your charge in United States District Court. **IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECIEPT OF THIS NOTICE OF RIGHT TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.**

If you cannot afford or have been unable to

obtain a lawyer to represent you. You should be aware that the Civil Rights Act of 1964, as amended 42 U.S.C. 2000e-5(f)(1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance well in advance of the end of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commissioner's case file.

An information copy of this Notice of Right to Sue was sent to the respondent(s) shown below.

On Behalf of the Commission

5/31/87 Warren A. Bullock
District Director

cc: Mike Goryle
Personnel Manager
Siemens Energy & Automation, Inc.
Post Office Box 6289
Jackson, Mississippi 39208

42 2000e-2 Unlawful employment practices

(a) It shall be unlawful employ
practice for an employer--

(1) to fail or refuse to hire or
discharge any individual, or other
to discriminate against any indivi
with respect to his compensat
terms, conditions, or privileges
employment, because of
individual's race, color, relig
sex or national origin; or

(2) to limit, segregate, or class
his employees or applicants
employment in any way which wo
deprive any individual of employm
opportunities or otherwise advers
affect his status as an emply
because of such individual's ra
color, religion, sex, or natio
orign.

(b) It shall be unlawful employm

practice for any employment agency to fail or refuse to refer employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis on his race, color, religion, sex, or national origin.

(c) It shall be unlawful employment practice for labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would

deprive or tend to deprive any indivi of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in

admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment an individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational

qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in subtantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion

(f) As used in this subchapter, the phrase

"unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, employment agency with respect to an individual who is a member of the Communist Party of the United State or any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this subchapter, it shall not be unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment in any position, for

an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfill or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color,

religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentialtion is authorized by the provisions of section 206(d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprises under which a preferential treatment is given to any individual becuase he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter

shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparision with the total number or percentage of persons of such race, color, religion, sex, or national origin in any

community, State, section, or other area. Pub.L 88-352, Title VII 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261 8(a), (b), Mar.24, 1972, 88 Stat. 109.

2000e-3.Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or particular in enforcement proceedings

(a) It shall be an lawful employment practice for an employer to discrimiante against any of his employees or applicants for employment, for an employment agency, or joint labor-managment committee controlling apprenticship or other training or retaining, including on-the-job training programs, to discrimante against any individual, or for a labor organization to discriminate aganist any member thereof or applicant for membership, because he has opposed any practice made an unlawful

employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

FEDERAL RULE OF CIVIL PROCEDURE 52(a)

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Then I got opportunity to move into programming position with Commerical Serice Corporations. I worked there about four years. and then I move up to--I got a better position with better salary at Unifirst. and further down with Mississippi Bank. and from Mississippi Bank, I went to work for Siemens.

Q. And do you recall the day that you were hired to work at Siemens?

A. It was November 23rd. 1981.

Q. Do you remember the person that you interviewed with and who actually hired you?

A. It was Norman Smith, he interviewed me and he hired me.

Q. Do remember your salary in 1981?

A. It was $2,300 a month.

Q. And your worked at Siemens until when?

A. Until October 23, 1987.

Q. Betweem 1981 and 1987, what, if any, increase in salary did you receive?

A. It was around six percent, you know, five percent, six percent. I don't remember exact percent, but I always got raise and when--when--when I left, I was making about $2,900, that's $34,600 annually.

Q. What benefits were provided in addition to a salary?

applicant occured?

A. That was early part--that was about '82 because the meeting we were--we were in was a Jose Gomez in the meeting, Bill Woodard was in the meeting, Norm Smith was of course, himself, and me and Tom McLendon.

Q. Continue on in your description of the way Tommy McLendon treated you or in describing your relationship with Mr. McLendon.

A. One other time--

Q. Prior to the filing of the first EEOC charge.

A. Okay. One other time, he--he mentioned --he made comments when Air India jumbo jet blew up, you know, it was bombed, and he made comment that, "You Indians are like that, you kill each other," that because it came in news there was Sikh who bombed that plane--

Q. Spell that word and explain what Sikh is.

A. Sikh is S-I-K-H. They are also Indians but they --they don't consider themself a Hindu, and so they probably was fight. In fact, Indira Grandhi was killed by an Sikh, and he--he--he said, "Are you people like that?" That was a comment about the community of, you know, Indian people. He always--whenever he talks, he try to put down the Indian community.

Another time that happended was in--i could be June '87 or July 87, there was news about same--same thing, Sikhs an Hindus, and that time in front of Mar Anderson, he made a comment, and he sai same thing, "You Indians are like that, yo kill each other."

Q. Did McLendon refer to you alway by your name Dayal or Mr. Pardasani?

A. No, a lot of times, he used t call by names like fat boy or short or baldy.

Q. Or what?

A. Baldy.

Q. Spell that?

A. Bald, you know--

Q. Oh, bald.

A. --I didn't have hair so say baldy

Q. Who evaluated you through 1985?

A. Norman Smith did.

Q. I'm going to hand you a documen

that's been pre-marked P-6, and ask you if you can identify that document?

A. (Examining) This as my performance review which Norm Smith did in 1985.

Q. Okay.

A. He gave me job performance 3.8.

Q. Is this the last evaluation that Norm Smith did on you?

A. That's right.

Q. Is this the standard form that is used in the data

completed, and then compare that with the date required up above, but the difference that will, of course, appear on some but not all, is generally unexplained.

THE COURT: Okay. But I don't thing that that bars it from being marked as an exhibit. We'll use it for an exhibit just to see what use they can make out of it. It's a business record. It will be admitted.

(Exhibit No. P-19 admitted in evidence.)

MR. HOLMES: Thank you.

Q. (By Mr. Holmes) I'll be referring to P-19 and referencing page numbers of that exhibit which appear on the right bottom corner on my next question. Mr. Pardasani, could you please flip to page 9 Exhibit 19, and I will ask you, what is significant about that assignment appearing in the analyst's comments?

A. (Examining) For this project, this user made the comment he was happy with my work. He say, "On this request, all store locations was changed to make store pick and pull faster to save product time. I think that the programmer did a very good job." It was signed by Jose Chambers.

Q. Could you please flip to page 16, and I will ask you the significance of the date that this document was sumbitted by

the requester and the date that you received it.

A. This was submitted May 29, '87, and he--

Q. When did you get it, Mr. Pardasani?

A. I received it August 3, '87, and on the top, it says, "Tommy, when this will be ready?"

Q. And what are the user comments and what is the significance of it?

THE COURT: What page are we on George?

MR. HOLMES: We're on page 47, Your Honor.

A. The comment says, "A plus work," Bill Gray, signed August 3.

Q. (By Mr. Holmes) If you would, refer to 48, 49 and 50, and tell the court whether or not there were delays in you obtaining those documents.

A. (Examining) Same way. Date it was submitted was April 6, '87, required, April 10, '87, and the comment says, "Completed 8/5, Bill Gray."

Q. Do you know of any reason for the delay in you obtaining these requests?

A. This how Tom McLendon was trying to put time pressure on me. He would give me all of sudden this request and at the same would say, "The user wants it today, the users want it yesterday," and that means I have--I go to finish as soon as possible.

Q. Turn to page 47, and I'm going to ask you what day that that document was given to Mr. McLendon?

A. (Examining) 47 was given to McLendon was May 29---

MR. MOELLER: Objection to when the document was given to

Mr. McLendon. This witness has laid no foundation by which he can give competent testimony as to whenever it was given to Mr. McLendon.

THE COURT: Just tell us what the form says. The date submitted in your experience there at the company means the date given to the data processing manager?

A. That's right, Your Honor.

THE COURT: Go ahead.

A. And that date is written by the users. Date submitted, May 29, '87.

Q. (By Mr. Holmes) What day did you file your first EEOC claim, Mr. Pardasani?

A. That was May 20, '87.

Q. The same day that you got that document or that same that Tommy McLendon got that document?

A. That's right, Your Honor.

Q. And when did Tommy McLendon give

that document to you to complete the job?

A. He gave August 3, '87.

Q. When did you complete that job?

A. I completed August 3, '87, same day.

Q. How else were you treated differently, Mr. Pardasani, after you filed your first EEOC claim?

A. Whenever Tommy used to go--Tom McLendon used to go away for vacation or for meetings or overnight or out of town he used to put someone in charge, and I put everybody in charge but me.

Q. Who else did he place in charge of the department? Who were the other people?

A. He put in charge Dan Truhett, Nathan Slater, Mark Anderson. He put in charge everyone but me.

THE COURT:: What was Mr. Smith's practice?

A. He used to put in charge--

THE COURT: Because he was the senior guy?

A. That s right.

Q. (By Mr. Holmes) Who was senior in the department when Tommy McLendon moved up into the manager's position?

A. I was. I was the senior most next to Tom McLendon.

Q. How were or how was the department informed that Mr. McLendon was leaving town and putting someone in charge in his absence?

A. Well, sometime he would write a note saying that, "I'll be out of town on such and such days and so and so will be in charge," and most of the time it would be verbal you know.

Q. How else were you treated differently? Is there any other events that you need to tell the court?

A. No.

Q. What was your relationship with your co-workers, Mr. Pardasani? Could you describe your relationship with them, just say 1978?

A. I had a good relationship with -- working relationship with all co-workers. It was just Tom McLendon, he--when I filed with EEOC, he started being more nice to everybody but me. He was fine--

Q. How? Can you describe that?

A. Well, having--having meetings more often with them, and just few minutes ago I specified putting them in charge when he leave, just to try to please them, doing different things.

THE COURT: Yes, you can rephrase if you want to rephrase your answer.

A. I was the only one in the past working on that plan of --part of programming, on-line programming, in past six years, five, six years.

Q. (By Mr. Holmes) Mr. Pardasani, before you go any further, I want to ask you about a particular job, the one that your're not describing now, that you had done for Toby Davidson. Does the work "At-a-boy-Project" mean anything to you?

A. That is the same one we're talking about.

Q. Okay, I'm sorry.

A. And that's the same on that got me out of the job. It's a--Toby Davidson calls his dock location tickets, and, you know, it was mentioned as a tag print program.

Q. When did Mr. Davidson approach you the first time with this project?

A. Well, he--he approached Tom McLendon, but Greg Johnson and Toby Davidson both were in need of that kind of program, and Greg Johnson did mention one time--

MR. MOELLER: Objection, hearsay.

Q. (By Mr. Holmes) Just describe the job that you were assigned, Mr. Pardasani.

A. I wrote this program from--originally, I was the author of this program.

Q. What was the name of the program when you first started working on it?

A. It--it is--it is called ticket--ticket print program.

Q. Okay.

A. And when I finished, it was writing tickets at dock location, and which was saving a lot of manual hours.

Q. I'm going to hand you a document, P-18, and ask you if you can identify that document.

A. (Examining) This is an at-a-boy letter I got from Toby Davidson for that same project that I described.

Q. What's the date on that letter?

A. This is dated December 3, 1986.

Q. Is this letter that was delivered or mailed to you?

A. No. This--this was delivered inter-mail or interoffice mail.

Q. It was delivered to whom?

A. It was delivered to me and a copy to Tom McLendon.

MR. MOELLER: No Objection

THE COURT: Be admitted.

(Exhibit No. P-18 admitted in evidence.)

Q. (By Mr. Holmes) Mr. Pardasani, now, I'm going to ask you to explain what the contents of that letter say.

A. This says "To Dayal Pardasani from manager, materials regulators, at-a-boy. This is to offer my thanks for support and guidance that you give in helping us with number one, dock location keying program, two, receving pre-printed ticket system.

Thanks again." Signed Toby Davidson

Q. And you received that on Decemb the 8th, 1986?

A. That's right.

Q. What is the date of Tomm McLendon's evauluation of you giving you 2.3?

A. This is dated December 10, '86.

Q. Okay. What computer language are you fluent in?

A. I've used a Cobol--excuse me--CIC command label, which you program for on line programming, and Mantis, which is als on-line programming. In past, I have program in RPG, and sometime in Fortran and I had used in school, Assemble, also.

Q. Did you learn all those lanuage through formal classes at Mississipp State?

going to produce will be going through the test libraries that we will test program before we put in production library, and that was the only main idea of security rules. And I--I did not disagree on that part. I like to, you know, test before I put in production, but the situation was, those--those system tools that would let me test through test libraries were not available at the time, and I had to finish the project, and I-- I did use some of those old tools, some of them, and that s been--I was --I was charged for violating the security rules.

I was in a position where either I got to finish the job, and I been doing-- I didn't grab any other--something new that-- that was protected, I been using same-- those system tools, and I was waiting for new ones. In fact, the project was taken away 20 -- 21st of October, and 22nd,

system programmer provided information about the new system tools that I been asking all along. In fact, I asked Tom McLendon in writing that I needed these system tools to finish the job, and I don't have it. It was affecting my--my performance image on other data processing--I mean manager of other departments, so one of the letters, I did include--I copied them, Mr. Greg Johnson and Toby Davidson, because the project was for them, and they knew, since it was my original program, they were pleased ,first time, so they were expecting me to finish on time and the

stay for--you know, as long as I don't get the tools. Either they let me use those same old tools that I've been using for years for they provide me new tools. And that next day after taking away project, they give me the sheet without date on it.

Q. Mr. Pardasani, my question was simply, you had the project three week around October 19th, now, isn't that correct?

A. That's correct.

Q. And at that time, did you ask for an additional three days to complete it?

A. Well, Tom came and he said, "You have additional three days to complete," and I--I requested for the tools because I had three days, if Iget tools, I can finish it.

Q. Didn't he give you an additional three days?

A. He did.

Q. And isn't it true at the end of those three days, which does bring us up to October 21, you had not completed?

A. That's correct.

Q. Now didn't he ask you to turn over all documents and materials relating to the

tag print program project to him at that time?

A. That's correct, that's correct.

Q. And didn't you refuse to do so?

A. That's correct.

desk, the more I thought about it and saw that I forgot to give him some of them. This particular project involves so many copies, and it wasn't--normally, you just work with one program, but this program, it was several copies, and when you get a threat for fire, you get-- you get nervous, and at that time, you can't think of every--every name of the file that, you know, you are working with, so I gave him what came from top of my head, and then when calmly I sat down, I wrote down on piece of paper, and I gave him in writing.

Q. Would you agree, Mr. Pardasani, that being a systems analyst in a big company like Siemens requires a high degree

of trust and confidence between individuals who are systems analysts and their boss?

A. Talking about trust?

Q. Trust and confidence.

A. Sure.

Q. That if for any reason the head of the department didn't trust you, that that would raise a severe security problem since with your access to the system, you could go in and destroy full programs.

MR. HOLMES: Object to the form of the question. It compound and its argumentative, and it's irrelevant, and it calls for speculation.

MR. MOELLER: Your Honor, we're not dealing with a

meet with you and go over your evaluation?

A. In just quickly what he had to say. In terms--in terms of that, yes, he did.

Q. Did he tell you that your

evaluation was based on user comments because you had only worked under him a short period of time.?

A. That's right.

Q. Now, isn't your job to satisfy users of data processing services?

A. That's--that's ultimate goal.

Q. Weren't you responsible for setting up a program for the fixed assets file?

A. That's right.

Q. And didn't the users, Debbie Jackson and Al Woelfle, experience problems with the program?

A. That--that's right, but I need to explain that in detail what kind of problem was it. It--Dick Holly was leaving accounting managership and Al Woefle was taking over, and that time, Dick Holly needed some extra work to do some kind of data entry, so he had some extra files. I

I let him use fixed asset file by making some changes in the program with the knowledge of Al Woelfle and Debbie Jackson. Debbie Jackson was not suppose to used fixed asset until Dick Holly was through with his project. and she might have forgotten, and she used fixed asset so her data got mixed

Q. And what is the date of that evauluation?

A. The reporting period is from 10/85 to 9/86.

Q. On what date did you sign the performance appraisal?

A. December the 10th, 1986.

Q. So you had been the manager of the data processing department for roughly a month; is that correct?

A. Yes.

Q. Now, Mr. McLendon, on this Exhibit

P-7. which is the 1986 performance appraisal for Mr. Pardasani, on the one hand, you state that Mr. Pardasani performed in his job class very well for the past two months, but then you likewise give him a total job performance rating of 2.3; isn't that correct?

A. I can't see the rating but--

Q. I'll hand it back to you.

A. (Examining) Yes.

Q. Now, a rating of 2.3, it's your understanding in your experience having been employed with Siemens is alow rating; isn't that correct?

A. Yes.

Q. is it your understanding that a rating of 2.4 is generally considered something of a level at which you become below the expectionations of Siemens?

A. Yes.

do additional training and that the employer should encourage him to seek additional training?

A. It says that --yes, it says that he should seek additional training or establish training programs to improve self-confidence and data knowledge.

Q. But Siemens is the one or your're the one who establishes the educational opportunities for the employees of Siemens; isn't that correct?

A. It's between myself and the employee to do this, yes.

Q. So on the one hand, Mr. McLendon, you tell him then in 1986 he needs more training, but you don't do anything about it in 1987; isn't that correct?

A. Neither I nor he did anything about it, yes.

MR. KOERBER: The court's indulgence just a minute, Your Honor.

THE COURT: Sure.

Q. (By Mr Loerber) Now, Mr. McLendon, there's been a lot said here about the security system that was implemented at Siemens in the fall of 1987. Do you remember when that system was implemented?

A. Not the exact date, no.

Q. And there's been some testimony regarding a project that had been given to Mr. Pardasani called the tag printout program. Are you familiar with that assignment that was given to him?

A. Yes, uh-huh.

Q. When was that assignment given to Mr. Pardasani?

A. The exact date I don't remember--September of '87.

Q. Well, you would agree with me, would you not, that roughtly that project request that was given to Mr. Pardasani for

that tag printout program was given out about the same time the security system measures were implented.

A. Somewhere close proximity, yes.

Q. Now, there's no real mystery about these security systems things, it's not anything to protect confidential information; isn't that correct?

A. Sure, it is.

Q. It's really an auditing system that Price, Waterhouse had recommended to Siemens; isn't that correct?

A. It does audit, it does tracking and protects valuable data that belongs to Siemens, which is very secure data.

Q. Isn't it correct that in your deposition that you gave in this case, you stated that part of the reason for the securtiy system was to really leave an audit trail where you could tell what a

system analyst had changed or not changed: isn't that correct?

A. I have agreed that part of it was for audit trail

purposes, which is tracking, yes.

Q. And I believe you said the security systems program is really to prevent any systems or application analyst just from compiling source or object information into production libraries; is that correct?

A. Yes, yes.

Q. And it just basically insures that Siemens can maintain that production library because that's what the users use; isn't that correct?

A. It's what we in data processing use to execute programs.

Q. Now, in simplified terms, what the security system was to do was to allow a

system analyst to go in and copy the production program into a library that the systems analyst had; isn t that correct?

A. Into an ICCF library, yes.

Q. And you had limited every systems analyst to eight libraries, ICCF libraries; isn't that correct?

A. Into an ICCF library, yes.

Q. And you had limited every systems analyst to eight libraries, ICCF libraries; isn't that correct?

A. Yes.

Q. So all systems analysts had access to at least eight ICCF libraries?

A. Right.

Q. So accessing those eight ICCF libraries would not have been in any kind of violation of the security system; is that correct?

it still your recollection that this is the only complaint that he made to you? And

your answer was?

A. (Pause)

Q. What was your answer?

A. "Yes," to that question.

Q. So that's not right. he had been complaining to you all along about his inability to be able to access the libraries and get the tools that he needed to be able to complete the tag print job; isn't that not right, Mr. McLendon?

A. No.

Q. Well, I'm going to hand to you a document that's been previously placed into evidence as Plaintiff's Exhibit 15, and ask you, did you receive that memorandum?

A. Yes, I did.

Q. And in that memoranda, Mr. Pardasani is telling you of his problems he's having completing the tag print project: isn't that correct?

A. Yes, he is.

Q. And in accessing the libraries that he says that he needed to be able to do the job; isn't that correct?

A. (Pause)

Q. Talking just generally, you can read it.

A. I don't think there's any reference to libraries in the memo.

Q. Well, when the system analyst of your department talk about them needing tools to be able to do the job, that being the commands to do the job, those commands are housed in libraries, is that not correct?

A. Yes.

Q. And he's referring to tools that he needs to be able to complete the job: isn't that correct?

A. He's referring to tools that he thinks he need to complete the job, yes.

Q. Well, after you got this

memoranda. P-15, you did not do anything to investigate his complaints, did you not?

A. Yes.

Q. Well, the only thing you did was to refer him to Dane Truhett; isn't that correct?

A. Correct.

Q. You did not yourself go over and try to see what the problem was on the computer, did you not?

A. I talked to Dane Truhett prior to sending Dayal to him to find out exactly how to perform the measures to keep from using the old tools that he had been using.

Q. But here was one of your employees under your direction coming directly to you telling you of a problem and all you did was send him to somebody else; isn't that right?

A. Some one who knew more about the particular system

A. Designed to perfect--to protect files and programs that did belong to Siemens. yes.

Q. On page 88 of your deposition, I believe the question is asked to you on line 6. "Is the security system a security device in the classic sense of the word to keep certain things confidential?" And your answer was unequivocally what?

A. "No."

Q. Also, Mr. McLendon, I'd asked you some questions about whether Dayal was able to do everything that he need to do with the tag printout program during the regular business hours, and your answer to me was, "Basically, yes;" is that correct?

A. I believe you asked was he able to make changes to the program during business hours and my answer was yes.

Q. Were there certain things that Dayal could only do after hours and on

weekends to--

A. Yes.

Q.--complete the tag print program?

A. Yes

Q. Now, Mr. McLendon, I'm going t
hand you what's been previously admitte
into evidence as Plaintiff's Exhibit 9, an
ask you if you can identify that for me
please.

A. (Examining) This is a --looks lik
a sheet from

THE COURT: I'll let you ask him.

Q. (By Mr. Koerber) How did yo
consider Mr. Pardasani in terms of being
candiate for any promotion in terms of hi
ability?

A. I thought he was a candidate fo
promotion. I-- in the last review I gav
him, which was approximately 12 month
before I left, I think that's the last on

you have. I had spelled out the things that I felt like he needed to concentrate on between then and his next review to qualify for that promotion.

Q. Did you have a promotion in mind?

A. Yes.

Q. What promotion would that have been to?

MR. MOELLER: Objection as to what the witness had in mind without any showing that there was an actual vacancy or any foundation being laid as to the existence of a vacancy. Again, this is pure speculation, and I object to this line of questioning on the basis that it is not something covered by either the complaint or the pretrial order.

THE COURT: All right. Go ahead. Overruled. You may ask him was there--let's lay a little groundwork. Was there

one or did he have the ability to open one or create one.

Q. (By Mr. Koerber) Was there a position open for promotion or did you have the ability to promote Dayal to a position or create one even?

A. Yes, I think the positions were based on--during my tenure with Siemens were based on qualifications, not openings. When you reached a certain plateau, if you were qualified, then you moved up.

Q. Thank you, Mr. Smith. And did you consider Dayal a promotion candidate based on his qualifications?

A. Yes, I did.

Q. Thank you. Now--

THE COURT: So you could have had two or three senior analysts like Mr. McLendon at the same time?

A. Yes, sir.

THE COURT: Okay.

Q. (By Mr. Koerber) Now, in your history as a manager of data processing, whenever you were out of the office, what was your normal practice of leaving any of your personnel in charge while you were gone?

A. My normal practice was to leave one of them in charge.

Q. Would it usually be the senior most employee in the department?

A. I rotated between those that I felt were qualified.

Q. And oftentimes, you left Mr. McLendon in charge, he being the most senior one, say in early 1986; isn't that correct?

A. That's correct.

Q. Now, in your experience as manager of data processing, was it common or uncommon to have users complain about

projects that you worked on?

A. Common.

Q. Very common?

A. (Witness nods head affirmatively.)

Q. In fact there was a lot of give and take between your department and the users in trying to get the programs just right, wasn't it?

A. Yes, very much The projects were worked on almost in every case initiated change in the user department, and almost in every case, even today, I mean, it's--it's the way it is, users resist as a rule, they resist change.

Q. In June 1986 when you left, about how many users did they have out there at Siemens or did Siemens have in general?

A. I'd say probably over 100 direct users and 300 indirect.

Q. If you--

A. 200, something like that.

Q. If you somehow made three users upset about your work, would that be uncommon?

A. No.

Q. Would that be universally negative appraisal by users of a system analyst doing his job?

A. I don't think it would be certainly by anyone that understands the nature of the beast, the technology, et cetera.

Q. Now, Mr. Smith, I believe you're aware that Mr. Pardasani has filed this lawsuit charging Siemens with age, national origin discrimination and discrimination against him in retaliation for his filing an EEOC charge. What observations have you made of Mr. McLendon while you were manager of data processing concerning Mr. McLendon's relationship toward minorities?

A. Well, like everyone, I guess Tommy

got along well with some and with some, he didn t.

Q. Well, there were particular instances, were there not, where Mr. McLendon did not get along with minorities; isn't that correct?

A. Yes, I--think you could say that.

Q. Now--

A. I wouldn't say that he didn't get along with them, but maybe he made a comment he shouldn't have made or something like that.

Q. What comments did he make, Mr. Smith, can you give us some examples?

A. Specifically, probably not. He made a comment to the lady in personnel once concerning applicant, a black applicant. I didn't hear the complete comment, but she was--she didn't appreciate it, she gave us both a tongue lashing, you know.

Q. What did Tommy say about the black applicant?

MR. MOELLER: Objection

THE COURT: Why? If he heard. he's one of his subordinates?

MR. MOELLER: Withdraw the objection.

THE COURT: Go ahead. You can tell me.

Q. (By Mr. Koerber) What did he say?

A. He told her something to the extent that the only reason she had him down there for an interview was because he was black or something like taht.

Q. Did he say the word "black" or did he use another word?

A. That the part I didn't catch. From her reaction, I'm assuming he didn't say black. but I don't know that.

Q. He said, "nigger. " didn't he?

MR. MOELLER: Objection. This

witness is--

THE COURT: Sustained. Don't put words in his mouth, he didn't say that. Let him testify.

Q. (By Mr. Koerber) Mr. Smith, do you recall an event between Tommy McLendon and couple of black employees, one John Lee and one Hurtis Ross?

A. Yes.

Q. Would you please describe what happened on that event?

A. Tommy--Hurtis and John Lee were black men. They hired in about the same time, I guess, that Tommy did. They were friends, they'd been friends for several years. And this particular event, they--within my department, they got to cutting up. Tommy was calling them "niggers", and they were calling him "whitey" or "honky" or something when I intervened and that was about the extent of it.

Q. And you cautioned Mr. McLendon, did you not, about doing that toward minorities?

A. I gave him a reprimand, and his response was "We're friends," and I think I told him at that time, you know, regardless, he couldn't do that within--you know, around me, so that was the end of it.

Q. Now, concerning Dayal in particular, have you witnessed any remarks that Tommy made towards Dayal about his Indian heritage?

A. Tommy made a comment once concerning dress.

Q. What did he say, Mr. Smith?

A. Dayal announced that his wife was pregnant. Tommy told him that if he wouldn't have been wearing that skirt around the house that wouldn't have happened to him.

Q. He was referring, was he not,to

the garb that Indian men wear that's like a dress?

A. Yes.

Q. Now, I understand, Mr. Smith, that you left Siemens in June of 1986, and I believe it's important for us to know, what were your reasons, for leaving Siemens in 1986?

A. Hindsight, I guess, is 20/20, but stupidity would be my excuse.

Q. Had you had a problem with a particular person in managment?

A. Yes, I did.

Q. And that person was Mr. Jim Malia; isn't that correct?

A. Malia.

Q. Malia. What particular problem did you have with Mr. Malia? What had Mr. Malia done?

MR. MOELLER: Objection, Your Honor. There are no allegations in this

Complaint. there's no claim by this individual against Siemens at all, and now, we are going to try some sort of other mini dispute in this lawsuit, which will hereby force the company to come forward with a detailed history of the problem that they experienced with this former employee.

MR. KOERBER: Your Honor, I'm sorry, Your Honor

A. I believe so.

Q. Do you know so?

A. Yes.

Q. Do you recall the name of the applicant?

A. No.

Q. Do you recall the name of the personnel person that you referred to?

A. Yes.

Q. And who was that?

A. Anna Ward.

Q. And is she employed by Siemens?

A. Now?

Q. Yes.

A. I don't think so, no.

Q. Now, you were, of course, Tom McLendon's department manager?

A. That's correct.

Q. As a result of this incident, did you prepare any kind of reprimand?

A. No.

Q. Did you in any way note it in his personnel file and the personnel department or any files in data processing department?

A. No.

Q. Other than the remarks of the personnel department person, Anna Ward, at that moment, was there any other follow-up discussions concerning this remark by Tom McLendon by anyone?

A. Not with Tommy, there was with my superior.

Q. Which is who?

A. Bob Steil.

Q. And again, did Bob Steil issue any kind of reprimand or any kind of report to Tom McLendon?

A. No.

Q. With respect to the remarks between John Lee Hurtis Watts and Tom McLendon, do you recall when those remarks occurred, that is the month and the year?

A. No.

Q. They would have been sometime prior to 1986; is that correct?

A. Correct.

Q. Do you know whether they were before 1985?

A. No.

Q. Do you know in what year these remarks were made?

A. I would say latter part of '84, early part of '85, somewhere along in

there.

Q. At the time, was John Lee an employee of the personnel department?

A. Yes, he was.

Q. Do you recall the position he held?

A. Yes.

Q. Would that have been September, '86?

A. No, it was not September of '86 when that took--oh, you mean my stepping into that position?

Q. I'm sorry. When were your given the assignment to write or to draft the security system?

A. I'm not certain what month it was.

Q. Who gave you that assignment?

A. Tommy McLendon.

Q. What experience or direction did he give you for the security system?

A. The direction was to see what

I could come up with, what I could design.

Q. Did he give any guidelines that were provided by Price, Waterhouse?

A. The guidelines that the production systems needed to be secured.

Q. You were directed to draft or develop this security system for the on-line and for batch?

A. Yes, for all source code and JCL.

Q. Did you develop the security system for the on-line and batch at the same time?

A. I believe, yes, because it was all source code, yes, all source code.

Q. Okay. Do you remember when you completed

Q. Did he need to get permission to use those from Tommy McLendon?

A. To use those functions separately from security system?

Q. Did you explain to Mr. Pardasani that these things were in the security system as drafted?

A. I don't know if I explained to anyone the complete concept of the security system.

Q. Was it apparent to you that Mr. Pardasani did not have a working knowledge of the security system at that time?

A. No. The knowledge of the security system to perform the security system, you would not have even need to have known that these things were even in the security system because these things were functions when stuff was placed back into production that only certain people had the authority to use if for some reason the security system did not work, so these things are going back into production, not coming out.

Q. So you, as a short step, these things were done automatically by the

security system?

A. Right.

Q. Did you tell Mr. Pardasani that?

A. I don't know if I told anybody that.

Q. Was that your big secret?

A. I was responsible for all system software and hardware maintenance and implementation problems.

Q. When you were at Siemens working in data processing, did you know Dayal Pardasani and the other people working in data processing?

A. Yes, I did.

Q. What kind of relationship did yo have with Mr. Pardasani?

A. I wouldn't say it was bad, it wasn't real--wasn't big buddies, but, you know, we certainly didn't fuss and fight or anything.

Q. You testified earlier that Mr. Pardasani complained to you or called you on a Saturday about the tag print program?

A. Yes.

Q. And that you--did he ask you in essence to give him authority to violate the security system?

A. From my recollection and after seeing that letter, it was the JCL that--those functions, and so I could not do that.

Q. And you told him that he would have to check with Tommy McLendon?

A. Yes.

Q. I think you testified that you completed the tag print program?

against. As to fights or spats in the office, I honestly can't recall individual instances. They may have occurred, but I suspect it was a bit more so then that,

tone of voice or, you know, facial expressions.

Q. In what ways did Mr. McLendon refer to Mr. Pardasani?

A. Well, Mr. McLendon did have nicknames for some of the people in the office and --and would refer to Dayal upon occasion as "my little fat buddy." I can't think of, you know, any other terms that might be--

Q. What, if any, comments do you recall Mr. McLendon making about Mr. Pardasani's national origin or religion?

A. Well, I can recall a particular joke which I believe I heard on more than one occasion.

Q. And what is that?

A. Mr. McLendon said Hindu was something he thought you stepped in in the barnyard.

Q. Did he make that remark in the

earshot of Dayal Pardasani?

A. I don't know.

MR. MOELLER: Object, again on the basis of my objection yesterday, move to strike, that whether or not the statement was made, it does not create an influence of national origin discrimination. It obviously does go to religious discrimination, and for whatever reasons, that

A. That's quite all right. We--I guess I knew at least one or two meeting before mine that Mr. McLendon was apparently trying to meet with each member of the staff individually, and his reason for meeting with the staff supposedly was to cover certain items of particular interest at that time, to speak to each one of us about a list of potential problem areas, one was tardiness, one was, I guess

too many personal phone calls and so forth.

Q. Did he address those problems that you might have been having to you at that meeting?

A. Yes, he did. He made a point, I believe, of covering those same points with everyone that he met with.

Q. After discussing those points, what subjects did you discuss with Mr. McLendon?

A. Well, he encouraged me in my meeting, as I later heard he encouraged others, to talk about any problems that we might be having within the office and started with--with that, I guess, open-ended question, you know. "What problems are you having, problems with getting supplies or problems with the environment, too noisy," you know, or whatever, but I did feel that his questions were a bit leading in that he encouraged us to talk

about problems we might be having with other individuals.

Q. Specifically whom?

A. I honestly cannot recall that names were mentioned. I can't be certain that they weren't, but it seemed clear to me at the time that he wanted--

MR. MOELLER: Objection to what it seemed from this witness. If the witness has facts upon which his opinion can be based, then I assume he can give them.

MR. HOLMES: I can lay afoundation for it.

THE COURT: Let's try to lay the foundation for an opinion like that because it's kind of esoteric. Let's see if there's some basis for it.

MR. HOLMES: Okay.

Q. (By Mr. Holmes) Do you recall specifically what Mr. McLendon said at the meeting?

A. Not word for word.

Q. Do you remember the specific subjects that he addressed besides the one you've already mentioned about your tardiness and so forth?

A. I'm certain that he asked the question along the lines of, "Are you having problems with any of your co-worker."

Q. And what was your response to that question?

A. I don't remember precisely, but I'm certain I said, you know.-- you know, "I'm not having any tremendous problems, some --occasionally, I have difficulty with other members of the staff.

A. Well, I believe he asked--I--I believe-- well, I recall that he asked about whether we were having difficulty for instance getting our printouts returned promptly from operations.

Q. Okay.

A. (Pause)

Q. Let me just ask you. You ended talking about Dayal Pardasani, did you no

MR. MOELLER: Objection, leading

MR. HOLMES: That's already be established by facts in evidence. I trying to move this witness along.

MR. MOELLER: It hasn't be established at all through this witnes It's been established through t introduction, apparently, of Defendant exhibit.

MR. HOLMES: Tommy McLend testified they talked about Dayal, Judge.

THE COURT: Go ahead. Did y discuss the plaintiff? Let's keep movi on this thing. I don't want to bog down.

A. It was clear to me that we we discussing Dayal Pardasani, whether he w mentioned by name or not, yes.

Q. How did you make that conclusion? Why was it clear to you that Mr. McLendon was talking about Dayal Pardasani?

A. Well, he asked if there was any resentment on my

you know--

Q. Do you think that Mr. Pardasani was discharged because of his incompetence?

A. I don't know.

Q. Do you recall or did you attend the EEOC hearing on Mr. Pardasani's charge?

A. The hearing?

Q. Yes.

A. No.

Q. It would have been in the Federal Building.

A. No.

Q. Has Mr. McLendon ever made any statement to you about his intentions or non-intentions of hiring minorities in the

future.

A. Yes, he has.

Q. What was that statement and when was it made?

A. The statement was, "If I get rid of the minorities out there," meaning outside the his office, "I'll be hard pressed to hire another one.

Q. When did he make that statement?

A. I'm not certain as to the exact date, but I believe it was some--I believe it was sometime between the period that Dayal filed his suit, but before he was discharged.

Q. That was before Mr. Pardasani was discharged?

A. Yes, I believe. I honestly can't remember for certain, but--

Q. Who was present when that statement was made?

A. No one that I know of but myself.

Q. He made the statement to you?

A. Yes.

MR. HOLMES: Court's indulgence.

Q. (By Mr. Holmes) Mr. Anderson, you had stated that Mr. Pardasani was incompetent in your opinion, I believe?

A. Yes.

Q. During 1987, what, if any, education opportunities, seminars or like events was Mr. Pardasani made available by Siemens?

A. None that I know of.

Q. What were you made available?

A. I attended one seminar to introduce the new system of accounting that Siemens--that the plant was adopting. It was in Atlanta, Georgia.

Q. What is your age?

A. I'm 35.

Q. And your race, for the record?

A. Caucasian.

Q. And your nation of birth? Where were you born?

A. The United States of America.

Q. Exhibit 57, which you still have, let me ask you,

Q. Now, at that time, you were still working in the accounting doing accounting work?

A. Yeah, I was still in accounting for accounting systems.

Q. That was all batch work, was it not?

A. It was batch work and on-line. Mine was some of both of them.

Q. Do you remember whether or not in Octoer of '87, you were doing any on-line work? It would have been right after the security system was implemented.

A. Let me just try to explain something. Yes, I was working in the one-

line area. but there are two ways that you can write on-line programs. One is using CICS Cobol, and the other in using Mantis. I was writing mine in Mantis.

Q. What was DAyal writing his with?

A. He was writing his in CICS Cobol.

Q. Do you know whether or not that he could access the necessary computer tools that he needed to complete the project that he was working on?

A. Not without assistance he couldn't.

Q. Assistance from whom?

A. Assistance from someone on the system programming side, and that would be either Dane Truhett or Rick Owens.

Q. Do you recall getting any written instructions on the on-line use of the --or after the new security rules

were install?

A. Yes, we got some instructions. I believe it was after it had been put in--put into place.

Q. Do you remember Dayal asking you to write a date or anything like that on a document?

A. Vaguely, yes. I do.

Q. I'm going to hand you what's been already admitted into evidence as P-9.

A. Uh-huh.

Q. And I'm going to ask you to look at the top right-hand corner where there's a date written. Could you describe that date?

A. (Examining) It has 10/22/87.

Q. Does that appear to be your handwriting?

A. Yes, it is.

Q. Going back to my question and after observing this document, do you remember writing that date on that

document?

A. Yes, I do.

Q. Do you remember whether or not you wrote that date on the day that you received that document?

A. I-- I can't be for sure.

Q. Would you or do you recall any reason for you not to have written the correct date on that document?

MR.MOELLER: Objection. The question has been

A. Yes, it is.

Q. And having participated in that process, is that an accurate representation of how the termination was actually carried out?

A. Yes, it is.

MR. MOELLER: Indulge me for one minute, Your Honor.

Q. (By Mr. Moeller) Mr. Goryl,

following Mr. McLendon's promotion to data processing manager, has Siemens ever employed a senior systems analyst on the applications side?

A. No, we have not.

Q. Based on your knowledge of Dayal Pardasani's termination, the reports that you received, both written and oral, the knowledge you have as a user of data processing services, including your knowledge of Dayal Pardasani's work yourself, based on all these facts, do you know of any fact that indicates to you that Dayal Pardasani was fired in any manner in retaliation for filing his first EEOC charge?

A. No.

Q. Fired because of his national origin?

A. No.

Q. Do you know of any facts, based

upon your knowledge about this case, that indicates that Dayal Pardasani was fired for any reason other than the reasons

Supreme Court, U.S.
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(2)

No. 91-924

In The

Supreme Court of the United States

October Term, 1991

DAYAL PARDASANI,

Petitioner,

vs.

SIEMENS ENERGY AND AUTOMATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should the United States Supreme Court re-evaluate factual disputes which have been resolved by the United States District Court for the Southern District of Mississippi and affirmed by the Court of Appeals for the Fifth Circuit?

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No. 91-924

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Siemens Energy and Automation, Inc. ("Siemens"),[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 28, 1991.

[1] Respondent Siemens is owned by Siemens Corporation of Delaware, which in turn is owned by Siemens A.G. of Germany.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported, but is included herein at Appendix A, p.1a. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Mississippi were also not reported, but are included at Appendix B., p.1b.

STATEMENT OF THE CASE

For the sake of brevity, Respondent adopts and incorporates by reference the facts of the case as set forth in the District Court's Findings of Fact and Conclusions of Law. Because of the numerous errors in Petitioner's version of this document (Pet., App. 25-App. 60)[2], Respondent has reproduced the District Court's findings and conclusions at Appendix B, pp.1b-19b. As required by Supreme Court Rule 24.2, the following is submitted to point out inaccuracies and omissions in Petitioner's Statement of the Case.

Petitioner misrepresents to the Court that it was a United States Magistrate who dismissed Petitioner's claims of religious discrimination, defamation, intentional infliction of emotional distress and violation of 42 USC § 1981 pursuant to Respondent's Motion to Dismiss.

---

[2] "Pet." refers to Petitioner's Petition for Certiorari and is followed by the page number cited, either in his brief or the Appendix. "App. A" or "App. B" references the appendix of Respondent's Brief in Opposition followed by the cited page numbers.

(Pet. 5). In fact, it was U.S. District Court Judge Tom S. Lee who ruled on Respondent's Motion and dismissed these claims. (App. A, p.5a).

Petitioner states that the dismissal of plaintiff's claims of religious discrimination, defamation, intentional infliction of emotional distress, and violation of 42 USC § 1981 was appealed. (Pet. 5). To the contrary, only the trial court's dismissal of Petitioner's national origin discrimination and retaliation claims was appealed. (App. A, p.6a).

Petitioner's Statement of the Case presents what the Petitioner wishes the trial court had found. Petitioner's gloss reflects a good employee unfairly treated by his racist boss. Obviously, the District Court found otherwise. To support Petitioner's version of the "facts," Petitioner includes portions of the trial transcript at Pet. App. 109 through App. 175. However, Petitioner's jumbled compilation of this appendix takes portions of the trial testimony out of context and results in a misleading impression of the proceeding. In fact, it is impossible even to ascertain from the appendix what witness was testifying or where the transcript changes from one witness' testimony to another's.

The Statement of the Case and Appendix omit any reference to the substantial record evidence that contradicts his allegations. For instance, Petitioner makes no mention of the favorable treatment and assistance he received from Tommy McLendon when Petitioner's father died. (App. A, p.3a and App. B, pp.5b, 6b).

In his attempt to recast the record before this Court, Petitioner relies extensively on the testimony of Norm

Smith. Petitioner ignores the fact that Norm Smith was forced to resign his employment because of his unsatisfactory job performance and deficient operation of the Data Processing Department. (App. A, p.2a and App. B, p.3b). Accordingly, Petitioner's reliance on Smith's testimony to establish proper company policy, procedure and standards (*see, e.g.* Pet. 10, 11, 12 and 18) is unwarranted.

Petitioner also relies on the alleged statement attributed to Tom McLendon that, "If I get rid of the minorities out there, I'll be hard pressed to hire another one." Petitioner erroneously assumes that this statement is a fact. However, this alleged statement was totally uncorroborated at trial and was denied by McLendon. Obviously, Petitioner is asking this Court to engage in fact finding.

REASONS FOR DENYING THE PETITION

Through his Petition for Certiorari, Petitioner asks this Court to retry this case *de novo*. Petitioner simply disagrees with the factual findings of the trial court which were affirmed by the Fifth Circuit Court of Appeals. This Court has historically declined to give such broad scope to its review. *United States v. Oregon State Medical Soc.*, 343 U.S. 326 (1952); *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

This Petition for Certiorari marks Petitioner's third attempt to have the factual findings and legal conclusions of the trial judge overturned. Petitioner initially filed a Motion for a New Trial or for Reconsideration in district

court. Petitioner subsequently appealed to the Fifth Circuit Court of Appeals raising the same issues he now urges upon this Court. Still dissatisfied, he asks this Court to grant certiorari. However, as stated long ago by this Court, "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923).

1. Petitioner claims that this Court should grant certiorari because the Fifth Circuit Court of Appeals' ruling was in conflict with *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). *Aikens* teaches that the ultimate factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff – not whether *vel non* a *prima facie* case has been established. *Id.* at 715. Contrary to the Petitioner's contention, *Aikens* does not overturn the widely accepted practice that, as held by Fifth Circuit in *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970):

> The trial judge may conclude, as occurred in this case, that it is inadvisable to sustain a defendant's motion midway in the trial and that trial should be completed. The denial amounts to no more than a refusal to enter judgment at that time, a tentative and inconclusive ruling on the question of the plaintiff's proof. It does not preclude the trial judge from making, at the conclusion of the case, findings and determinations at variance with its prior tentative ruling.

Id. at 797-98. *See also Integrated Circuits Unlimited v. E.F. Johnson Co.*, 875 F.2d 1040 (2nd Cir. 1989) ("During the

resolution process the trial judge in a bench trial must be free to reassess the evidence, and to alter or modify its view before final judgment (citations omitted). It should not be – nor is it – bound in any way by its preliminary determinations which, upon further reflection it later concludes were mistaken"); *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980); *E.V. Prentice Mach. Co. v. Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir. 1958). Motions for involuntary dismissal or directed verdict after the plaintiff rests are standard trial practice, and a defendant is not doomed to ultimate defeat simply because he does not prevail on his motion.

In *Aikens*, the Court was concerned that the parties and the Court had "unnecessarily evaded the ultimate question of discrimination *vel non*." *Aikens*, 260 U.S. at 714. In the instant case, however, that is not a concern, for even though the Court found that Petitioner had not established all the elements of a *prima facie* case of national origin discrimination or retaliation, the Court went further and determined the ultimate question of discrimination. The Court "assumed" that Petitioner had established a *prima facie* case and held that Respondent had not unlawfully discriminated against the Petitioner. (App. B, pp.14b, 16b, and 18b). Accordingly, even if this Court were to agree with Petitioner that the Court erroneously analyzed the existence of a *prima facie* case at the close of the trial, Petitioner could obtain no relief since the ultimate factual issue regarding intentional discrimination was found against the Petitioner.

2. Petitioner, rearguing before this Court his version of the facts, contends that the Courts below should have

used the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) "mixed-motive" standard. To the contrary, the plain language of the *Price Waterhouse* opinion mandates that, under the facts of *this* case, use of the mixed-motive analysis would be improper. This Court held in *Price Waterhouse* that mixed-motive analysis is not triggered unless and until the plaintiff proves that a prohibited factor "played a motivating part in an employment decision. . . . " *Id.* at 258. Before the *Price Waterhouse* analysis can be utilized, "the plaintiff must show that the employer actually relied on [a prohibited factor] in making its decision." *Id.* at 251; *accord Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989).

In *Price Waterhouse*, the District Court clearly found that sex stereotyping played a part in Hopkins' evaluation as a candidate for partnership. *Id.* at 255. In the case *sub judice*, the Court never found that plaintiff's national origin or the filing of his May 1989 Equal Employment Opportunity Commission charge played any role whatsoever in his discharge. Petitioner's former counsel conceded this in his brief to the Fifth Circuit Court of Appeals:

> Even though the Magistrate found legitimate, non-pretextual reasons for Mr. Pardasani's termination in the instant case, he failed to recognize overwhelming evidence that illegitimate motives played a part in the decision to terminate Mr. Pardasani as well. . . . Had the Magistrate made such a finding, he would have correctly applied the *Price Waterhouse* standards . . .

The lack of this requisite finding is fatal to plaintiff's argument. Realizing this, Petitioner reargues the evidence as if this petition were for a trial *de novo*. As this Court has noted, however, it will not set aside findings of fact unless clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses. *United States v. Oregon State Medical Soc.*, 343 U.S. 326 (1952). In the case *sub judice*, the trial court considered the testimony of the Petitioner's seven witnesses and the Respondent's six witnesses "including their demeanor and credibility and the relationship of each individual's testimony to that of other witnesses and the exhibits" and thereafter rendered his findings of fact. (App. B, p.2b).

In asking this Court to overturn the trial court's findings as clearly erroneous, plaintiff relies on an alleged statement attributed to Tommy McLendon. As stated above, plaintiff's reliance on this uncorroborated and contested statement is misplaced. Even if the statement were made, which is denied, it still would not prove national origin or retaliation played a motivating part in plaintiff's discharge. *Price Waterhouse v. Hopkins*, 490 U.S. at 251; *Young v. City of Houston, Tex.*, 906 F.2d 177 (5th Cir. 1990) ("stray remarks in the workplace . . . cannot justify requiring the employer to prove that its [employment] decisions were based on legitimate concerns.")

Moreover, as the evidence showed and as the Court found, the decision to discharge the Petitioner was not made by the alleged racist, Tom McLendon. The decision to terminate Petitioner was made by Respondent's Employee and Community Relations Manager, Michael

Goryl, after discussions with other individuals in Respondent's management. (App. A, p.5a and App. B, p. 11b). The Court did not find, nor did the evidence show, that national origin or retaliatory animus played any role in the decision to terminate Petitioner. Accordingly, the *Price Waterhouse* mixed-motive standard never applied to the facts as properly found by the district court and as affirmed by the Fifth Circuit Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARMIN J. MOELLER, JR.
(Counsel of Record)
DAVID M. THOMAS II

December 26, 1991

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1106
Summary Calendar

DAYAL PARDASANI, Plaintiff-Appellant,

versus

SIEMENS ENERGY AND AUTOMATION, INC., Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi
(CA-J89-246(L))

(August 28, 1991)

Before CLARK, Chief Judge, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

I.

Dayal Pardasani appeals from the Magistrate's dismissal of his claims of national origin discrimination and

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

retaliatory termination against defendant Siemens Energy and Automation, Inc. (Siemens). We affirm.

II.

In 1981, Siemens hired Pardasani as a systems analyst. From 1982 through 1985, Pardasani received favorable annual evaluations from his supervisor, the Manager of Information Systems, Norm Smith.

Pardasani's job involved receiving requests from other departments in the company and developing and modifying computer software to meet these requests.

In 1986, Siemens became dissatisfied with Smith and the Information Systems Department. As a result Smith resigned and Siemens appointed Tom McLendon, the most senior employee in the Department, as Acting Manager in charge of the applications side of the Department. McLendon reported to controller Bob Steil.

McLendon and Pardasani had worked together in the same department for years, but had what the Plaintiff terms a "sour relationship."

After only three months as Acting Manager, McLendon was to perform the annual evaluation for Pardasani, due in October 1986. Because he had been supervisor for a short period, McLendon solicited comments and reviews from other supervisors in the company. Based on this information, McLendon completed his evaluation and met with Pardasani to review it. Pardasani refused to accept his evaluation of 2.3 on a 5 point scale, claiming that any unsatisfactory work resulted from improper instructions from the requesting party. As a result of his

poor evaluation, Pardasani did not receive a raise in 1986-87.

Pardasani complained to the Employee and Community Relations Manager Michael Goryl regarding his evaluation. After a meeting between Pardasani, McLendon and Goryl, the evaluation remained the same. Goryl also expressed dissatisfaction with Pardasani's work.

In February 1987, Pardasani requested a leave of absence to go to India and attend his father's funeral and settle his father's affairs. His request was granted. During Pardasani's absence, which extended beyond his accrued vacation time, McLendon made sure that Pardasani received full pay, a $1,000 advance to pay for the airline ticket and participated in a collection to assist Pardasani.

In May 1987, Pardasani filed a claim with the Equal Employment Opportunity Commission (EEOC), alleging age, race and religious discrimination in the denial of a fair evaluation and promotion to senior analyst. In actuality, nobody was ever promoted to senior analyst after McLendon became Acting Manager. Siemens declined to fill the vacancy in order to save money.

Subsequent to Pardasani's evaluation and meeting with Goryl and McLendon, his work performance started to decline, as noted in his personnel file.

In September 1987 Siemens implemented a security system for its computers which limited access to programs in order to prevent more than one analyst from working on a program at one time. At this same time, Siemens also restricted access to ICCF libraries (the actual locations in the computer where the programmer/analyst

would work on changing programs or creating new ones). Both of these changes were implemented at the suggestion of a Price Waterhouse auditor's report regarding the Information Systems Department.

On or about September 21, 1987, Pardasani received an assignment to modify a tag print program. Pardasani repeatedly delayed the due date for the completed project. Despite two extensions, the program remained incomplete one and a half weeks after the initial due date.

Pardasani alleges that the restrictions for the new security systems and library access caused the delays. Despite these difficulties, Pardasani claims that the program was almost complete on October 19. Testimony of other witnesses contradict Pardasani. At first Pardasani claimed he could not complete the project without greater access and then he claimed he was almost finished. One system analyst testified that all the analysts knew the security restrictions and library access restrictions, but still had access to all the tools and information required to complete assignments. Data Processing Systems Supervisor Truhett testified that Pardasani called him one weekend asking for information to circumvent the security system for working on the tag print program. Truhett told Pardasani to ask McLendon for permission, which Pardasani never did.

The Monday following this conversation, at McLendon's direction, Truhett took over the tag print program and found first that Pardasani had not progressed to the extent represented and second that completion was possible without violating the security system, despite Pardasani's claims to the contrary. As a result of Pardasani's

failure to complete the program, McLendon asked him to turn over the project on October 19, 1987. At first Pardasani refused to do so, keeping to himself the information and location of ICCF libraries needed to complete the project. After McLendon asked a few more times, coupled with a threat of termination for failure to comply with the Manager's orders, Pardasani agreed to turn over all of the requested information. When McLendon received the information from Pardasani, McLendon understood that he had all the necessary information, however, later that same day Pardasani advised McLendon in writing of additional information needed to complete the program.

This last turn of events prompted McLendon to meet with Goryl and discuss Pardasani's performance, specifically McLendon's loss of trust in Pardasani and fear for the security of the data processing information. After speaking with several corporate officials, Goryl decide (sic) to terminate Pardasani for insubordination and unsatisfactory work performance. Pardasani was terminated October 23, 1987. McLendon and other existing system analysts assumed Pardasani's duties. Approximately two years later, a systems analyst was hired at a comparable level.

On October 26, 1987, Pardasani filed a second charge with the EEOC, alleging that his termination was in retaliation for his first charge with the EEOC. He then filed suit against Siemens in April 1989. The district judge granted Siemens' Motion to Dismiss on Pardasani's claims for religious discrimination, defamation, intentional infliction of emotional distress, and violation of 42 U.S.C. § 1981.

The case regarding the age, race (sic) national origin discrimination and the retaliatory termination was tried before a magistrate judge. At the conclusion of Pardasani's case, his claims of age and race discrimination were dismissed. After trial the court dismissed plaintiff's remaining claims of national origin discrimination and retaliation finding that the plaintiff failed to make his *prima facie* case. Pardasani appeals only this last dismissal.

III.

Pardasani raises two issues before this court. First, he argues that the district court erred in focussing on the *prima facie* case once the defendant had presented his evidence. Instead, he contends the magistrate judge should have focused on the ultimate issue of discrimination. Pardasani's second argument is that the district court applied the wrong standard for reviewing the claims. According to Pardasani, the district court should have applied the "mixed motive" standard announced in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), instead of the test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

A. *Standard of Review*

The clearly erroneous standard applies to the district court's finding on discrimination. *See Barnes v. Yellow Freight Sys.*, 830 F.2d 61, 62 (5th Cir. 1987). This Court must review findings of fact under the same standard. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985).

B. *The District Court Was Correct to Dismiss Plaintiff's Claims for Failure to Make a Prima Facie Case*

Pardasani argues that under *United States Postal Service Bd. of Governor (sic) v. Aikens*, the court should not have focused on the issue of plaintiff's *prima facie* proof once it heard the case on the merits. In *Aikens*, the Supreme Court held that when a defendant in a discrimination case loses a motion to dismiss or a motion for directed verdict and then offers evidence of legitimate, nondiscriminatory reasons, the factfinder must then decide the ultimate issue of discrimination. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983). Once the defendant presented his evidence, the plaintiff's *prima facie* case is no longer the issue.

The court's initial denial of the motion to dismiss does not preclude a later determination that the plaintiff did not make out a *prima facie* case after all. In *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970), this Court held that denying a defendants motion at the end of plaintiff's case is merely a tentative finding that plaintiff met his burden. *Id.* at 797-98. Denying a motion to dismiss does not preclude the trial judge, at the conclusion from findings and determinations at variance with the prior tentative rulings. *Id.*

In this case, after receiving defendant Siemens' evidence regarding Pardasani's work performance and termination, the court could correctly find that the plaintiff failed to prove all the elements of his *prima facie* case. Specifically, the court found that Pardasani was not qualified for his position, a necessary element in his *prima facie*

case for national origin discrimination involving his promotion and termination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[2](sic) In addition, evidence supports the court's finding that the plaintiff did not meet his burden of proving that he was replaced by a nonprotected class member. Nobody was promoted to senior analyst and nobody was hired in his position until two years after his termination.

Regarding the claim of retaliatory discharge, the district court correctly found that Pardasani failed to meet the third element of his *prima facie* case. Pardasani was required to show (1) that he was engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. *See McDaniel v. Temple Indep. School District*, 770 F.2d 1340, 1346 (5th Cir. 1985); *Jack v. Texaco Research Center*, 743 F.2d 1129 (5th Cir. 1984). In light of Siemens' evidence regarding the reasons for Pardasani's termination and the history of his performance, the court could find that plaintiff failed to prove any "causal connection" between his filing the EEOC claim and his discharge.

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[1] To establish a *prima facie* case of national origin discrimination regarding his evaluation or discharge, the plaintiff must prove (1) that he was a minority group member, (2) that he was qualified for the job or deserved a fair evaluation, (3) that he was discharged or suffered adverse treatment, and (4) that he was replaced by a nonminority group member or a nonminority group member received a better evaluation for the same work. *See McDonnell Douglas* at 801; *Davin v. Delta Airlines, Inc.*, 678 F.2d 567 (5th Cir. 1982).

After a discrimination case is fully heard on the merits, the court usually should not address the issue of plaintiff's *prima facie* case, but instead address the ultimate issue of discrimination. *Aikens* at 714-15. When, however, a court, upon hearing additional evidence regarding the plaintiffs qualifications and replacements, finds that the plaintiff failed to meet his initial burden, it may vacate an earlier finding and dismiss the case for failure to prove a *prima facie* case. Here the court correctly dismissed the actions for failure to prove a *prima facie* case. The record supports the court's findings. They are not clearly erroneous.

C. *The Defendant's Behavior Does Not Trigger the "Mixed Motive (sic) Test of Price Waterhouse v. Hopkins*

In its opinion, the district court stated that even if Pardasani had established a *prima facie* case of national origin discrimination or retaliatory discharge, he had failed to show pretext after the defendant's showing of legitimate, nondiscriminatory reasons for the termination and evaluation. Pardasani argues that the court should not have applied the pretext test in *McDonnell Douglas*, but instead applied that "mixed motive" test announced in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). Because Siemens' behavior does not justify bypassing *McDonnell Douglas*, the court correctly refused to apply the *Price Waterhouse* test.

In *Price Waterhouse*, the Supreme Court held that an employer may still be liable for discrimination if its legitimate reasons for hiring or firing are mixed with

nonlegitimate reasons. *Id.* at 1795. If the plaintiff can prove that a discriminatory purpose played a part in the defendant's decision, the burden is then upon the defendant to show that the same decision would have been made absent the discriminatory purpose. *Id.*

It is plaintiff's contention that the district court should have applied this mixed motive standard to find against Siemens, despite the defendant's evidence of legitimate, nondiscriminatory reasons. This Court has recognized that *Price Waterhouse* requires a new standard of proof for mixed motive discrimination cases, but it has also recognized, as the Supreme Court did, that not all cases are mixed motive. Some remain pretext cases. *See Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989). Before a trial court applies the mixed motive test, it must find that the case involves mixed motive. *Price Waterhouse* at 1789 n.12. If the plaintiff does not establish that the discriminatory purpose played a motivating part, then he or she must show pretext. *Id.*

In *Young v. City of Houston, Texas*, 906 F.2d 177 (5th Cir. 1990), this Court addressed the proof necessary to show that a mixed motive exists. Citing *Price Waterhouse*, we held that the employee must show that the employer actually relied on the protected factor when making its decision. Stray remarks regarding stereotypes alone are not sufficient. *Id.* at 182. In that case statements that Young was a "white token" and "white faggot" did not trigger the mixed motive test. These statements did not rise to the level of racist animus necessary to bypass *McDonnell Douglas*. *Id.* at 181.

Pardasani alleges that the statement "If I get rid of the minorities out there, I'll be pressed to hire another," allegedly made by McLendon sufficiently demonstrates national origin animus. The district court obviously did not find that this statement sufficed to bypass *McDonnell Douglas*. The alleged statement does not constitute the level of ethnic animus established in *Walsdorf v. Bd. of Commissioners*, 857 F.2d 1047 (5th Cir. 1988). *Walsdorf* affirmed the grant of Title VII relief to a woman who was not promoted. In that case, the supervisor said about the plaintiff, "ain't no bitch going to get this job." The statement in today's case which Pardasani suggests is equal, is not. Therefore he was required to demonstrate pretext or produce more specific evidence of intentional discrimination under *McDonnell Douglas*.

D. *The District Court Correctly Allowed the Claim Based on National Origin Discrimination to Go Forward.*

Siemens argues that because Pardasani did not check the box next to national origin on the EEOC charging form, Pardasani is precluded from basing a suit on that claim. The court correctly found that Pardasani's mistake did not bar his claim.

This Court has held that failure to check a box on an EEOC form does not preclude a plaintiff's Title VII claim. *See Galvan v. Bexar County, Texas*, 785 F.2d 1298 (5th Cir. 1986); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). Siemens had adequate notice regarding Pardasani's EEOC charges and a mere technicality does not preclude Pardasani's bringing this suit.

IV.

The judgment appealed from is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DAYAL PARDASANI Plaintiff	)	
v.	)	CIVIL ACTION NO.
SIEMENS ENERGY AND AUTOMATION, INC.,	)	J89-0246(L)
Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND

This matter is before the Court as the result of plaintiff Dayal Pardasani's ("Pardasani" or "plaintiff") Second Amended Complaint filed on August 15, 1989, complaining about disparate employment conditions and his termination by defendant, Siemens Energy & Automation, Inc. ("Siemens" or "Company"), on the basis of his race, national origin, age, religion and retaliation for filing a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff also complained of alleged defamation and intentional infliction of emotional distress. Pursuant to Defendant's Motion for Summary Judgment, the Court dismissed plaintiff's claims under 42 U.S.C. § 1981 and his religious discrimination claims, defamation claims, and claims of intentional infliction of emotional distress by Memorandum Opinion and Order dated June 27, 1990.

Pursuant to the parties' agreement, the parties stipulated to a hearing before and entry of judgment by the undersigned U.S. Magistrate. The trial was conducted on October 10, 11, 12 and 18, 1990. Following the plaintiff resting his case, defendant moved for a directed verdict and the Court dismissed plaintiff's claims concerning age discrimination and race discrimination on the basis that the plaintiff had presented no credible, material evidence that plaintiff had been discriminated against because of his age or race (as distinguished from his national origin, Indian). Upon consideration of the entire record in this case, the Court hereby affirms its dismissal of plaintiff's race and age discrimination claims.

The plaintiff called seven witnesses who introduced 41 exhibits. Siemens called six witnesses and introduced 69 exhibits. Upon considering the testimony of plaintiff's and defendant's witnesses, including their demeanor and credibility and the relationship of each individual's testimony to that of other witnesses and the exhibits, including logical inferences which can be drawn from them, the Court hereby makes the following findings:

II.

FINDINGS OF FACT

Mr. Pardasani was hired by Siemens on November 23, 1981 as a systems analyst. Siemens considered his job performance satisfactory through early 1986. From 1982 through 1985, Pardasani received favorable annual evaluations on his performance from his supervisor, the Manager of Information Systems, Norm Smith.

The Information Systems Department (herein referred to as "the Data Processing Department") did not actually produce products sold by Siemens, but provided data processing services to all of the departments in Siemens' Jackson facility. Siemens' Jackson facility employs approximately 575 employees engaged in the assembly and manufacture of large electrical and electro-mechanical devices such as transformers and related electrical distribution equipment for utility companies.

As a systems analyst, Mr. Pardasani's job involved receiving assignments from his departmental supervisor (herein referred to as the "Data Processing Manager"). Specifically, when a user of data processing services in another department requested that an existing computer program be changed or a new program written to perform certain functions relating to their department's activities, it was Mr. Pardasani's responsibility to understand the user's "concept" concerning what the user wanted to accomplish with a computer program, and to transform that concept into logical computer language so as to create a new program or modify an existing program to achieve the user's objectives.

In early 1986, Siemens became dissatisfied with the Data Processing Manager's operation of the Data Processing Department as well as his job performance. Data Processing Manager Smith was given the option of either resigning or being terminated; Mr. Smith elected to resign. Around July, 1986, senior systems analyst Tom McLendon, the most senior employee in the Data Processing Department, became Acting Data Processing Manager at least with respect to the "applications" side of the

department as distinguished from the "systems" side. McLendon reported to Controller Bob Steil.

While Acting Data Processing Manager McLendon and plaintiff had worked together effectively for years, they had what the plaintiff characterized as a "sour" personal relationship.

Acting Data Processing Manager McLendon was advised that as part of his duties, he must conduct Pardasani's annual evaluation which was due October, 1986. Mr. McLendon protested that he had not worked with Mr. Pardasani long enough in a supervisory capacity to effectively evaluate his work. Nevertheless, Controller Steil advised him that he must evaluate the plaintiff. To do so, McLendon solicited user comments concerning the quality of Pardasani's work. User comments were received by the Acting Data Processing Manager from Manager of Production Control Charles Herrington, Supervisor of Drafting Paul Gardner, Accounts Payable Supervisor Debbie Jackson and Accounting Manager Al Woelfle, who formally judged plaintiff's performance to be unsatisfactory and especially unacceptable relative to his status as the most senior systems analyst.

Based upon these user comments, Acting Data Processing Manager McLendon completed his portion of the written evaluation around October 1, 1986 and met with plaintiff to discuss it. Plaintiff told McLendon that he would not accept his unsatisfactory rating of 2.3 on a 5 point scale since he considered the evaluation to be unfair. As a result of the unfavorable evaluation, Mr.

Pardasani received no raise in 1986-87. Pardasani attributed the user's complaints concerning his work to incorrect instructions from the users or incorrect use of his completed programs by them.

On December 1, 1986, Pardasani wrote a letter to Employee & Community Relations Manager Michael Goryl complaining of the evaluation. On December 16, 1986, Mr. Goryl met with Mr. McLendon and Mr. Pardasani concerning his evaluation. Mr. Pardasani explained the reasons why he felt the evaluation was unfair and McLendon, who had been promoted to Data Processing Manager on November 1, 1986, explained the reasons for his low evaluation. When Mr. Pardasani and Mr. McLendon were unable to agree to any changes in the evaluation, Employee and Community Relations Manager Goryl advised Mr. Pardasani that he could not change the evaluation since it was the Data Processing Manager's responsibility to complete it. Mr. Goryl added that he had been a user of Mr. Pardasani's services and had found them unsatisfactory also. Mr. Goryl's dissatisfaction was apparently the result of Mr. Pardasani's work on a pension program project in which the Employee & Community Relations Department encountered numerous problems which were reported to Mr. Goryl by Personnel Assistant John Lee, a black male, who was also dissatisfied with Mr. Pardasani's performance.

In early February, 1987, Mr. Pardasani was notified that his father, who resided in India, had died. Mr. Pardasani requested a leave of absence in order to return to India to tend to his family's affairs, and it was granted. Mr. Pardasani did not return from his leave of absence for over three weeks. Plaintiff did not have sufficient accrued

leave to be paid for the entire period; however, on Data Processing Manager McLendon's recommendation, Siemens approved payment of full salary for the additional time off that plaintiff did not have sufficient accrued leave to cover. Additionally, the plaintiff was absent an additional two and one-half days during this period and was delayed in coming to work for several hours during certain days. Data Processing Manager McLendon recommended and the Company approved payment of his full salary for these periods. Additionally, Mr. McLendon recommended and Siemens approved payment of a $1,000 advance, in addition to plaintiff's salary, in order that Mr. Pardasani could purchase the airline tickets necessary for his trip to India. Mr. McLendon was also involved in taking up a collection among data processing employees to assist Mr. Pardasani.

On May 29, 1987, Pardasani filed a charge with the Equal Employment Opportunity Commission alleging that he had been discriminatorily denied a fair evaluation and promotion to senior systems analyst on the basis of his race, age and religion. While Mr. Pardasani alleges that he was discriminatorily denied a promotion to a senior systems analyst position around January, 1987, he concedes that no one was ever promoted to that position and the only person who ever held the position of senior systems analyst was Mr. McLendon. The uncontroverted testimony of Company witnesses established that Siemens' officials made the decision not to fill the position in order to save money and the functions of the position were absorbed by Data Processing Manager McLendon, the previous incumbent, and other systems analysts.

Subsequent to plaintiff's 1986 performance evaluation and his meeting regarding the evaluation with Tom McLendon and Mike Goryl, plaintiff's work performance continued to decline. From January, 1987 through mid-September, 1987, Data Processing Manager McLendon continued to note performance problems and user complaints as shown in numerous memoranda from Mr. Pardasani's departmental and personnel files. However, plaintiff's performance problems were not serious enough to require consultation by Data Processing Manager McLendon with Mr. Pardasani.

Around August, 1987, Data Processing Manager McLendon was advised of the results of a Price Waterhouse auditor's report concerning Data Processing Department operations. The Price Waterhouse report recommended implementation of a security system to prevent more than one computer programmer/analyst working on the same program at the same time (frequently without the knowledge of the other programmer). Previously this practice had resulted in changes being made to a program which were unknown to the other programmer. The Price Waterhouse report also recommended restricting access to ICCF libraries (the actual locations in the computer where the programmer/analyst would work on changing programs or creating new ones).

Data Processing Manager McLendon placed Data Processing Systems Supervisor Dane Truhett in charge of writing the security system program. Dane Truhett solicited the ideas of all data processing employees concerning the security system. With McLendon's approval,

Truhett implemented the security system around September 21, 1987, although cosmetic refinements were made and bugs were eliminated from the system for the next several weeks.

During this same period, McLendon directed Truhett to implement ICCF library restriction rules which limited each programmer/analyst to no more than eight (8) of 99 libraries. Around September 23, 1987, the plaintiff learned that systems analyst Mark Anderson had access to more than eight (8) libraries. On September 25, 1987, Mr. Pardasani wrote a letter to Mr. Goryl complaining about McLendon's unfair treatment of him by giving Anderson access to more than eight (8) libraries while he was restricted to eight (8) libraries. However, when McLendon and Truhett became aware of Mark Anderson's additional access to ICCF libraries, on or about September 25, McLendon directed Truhett to immediately correct the problem, which he did. Accordingly, the evidence establishes that Mark Anderson's additional ICCF library access compared to that of other programmer/analysts lasted for only two days and was the result of an oversight by Dane Truhett. Also, the evidence indicates that Anderson never used his additional access to violate the security rules.

Around September 21, 1987, Mr. Pardasani was assigned the task of making certain changes to a tag print program. Pardasani estimated that the amount of time required to complete the project should be two weeks. However, at the end of two weeks he had not completed the project and requested an additional week. At the end of the additional week his work remained incomplete and he requested an additional three days. Again, McLendon

granted him additional time. However, notwithstanding the additional time, plaintiff's work on the project was not completed.

During this period, the plaintiff alleges that he was not able to work on the project because he did not have the necessary tools to complete work on the project because of the implementation of the security system and the ICCF library rules. The plaintiff claims that he had to violate the security rules in order to work on the project. Despite these difficulties, the plaintiff claims that on October 19 he had completed all changes in the tag print program and performed most of the necessary testing of the changes.

The plaintiff's testimony and testimony of other witnesses, especially Dane Truhett and Mark Anderson, contradict his assertions. While the plaintiff testified that he was denied access to the proper commands and tools necessary to make changes in the tag print program, at other points he testified that he had completed all necessary changes and was completing the testing phase on October 19, 1987. Systems analyst Anderson testified that all data processing programmer/analysts knew the security rules, knew the ICCF library restrictions, and had access to all information and tools necessary to perform their job functions. Data Processing Systems Supervisor Truhett testified that he received a telephone call from Dayal Pardasani on Saturday, October 17, 1987 at his home and Pardasani requested that Truhett provide him information to circumvent the security system in working on the tag print program. Truhett advised Pardasani that he did not have the authority to do that, but advised him

to call Data Processing Manager McLendon for authorization. Pardasani concedes that he never called McLendon for authorization or assistance. Truhett testified that while he could not condone violating departmental rules concerning the security system, he was available to provide Pardasani with any information he needed in order to work on his project. The following Monday, Truhett took over the tag print program project at McLendon's request and, contrary to Pardasani's testimony, found that the work had not progressed to the point represented by Pardasani, but that completion of the project required much time and effort over parts of the next six work days. Truhett testified, however, that he was able to complete the project without violating the security system.

As the result of Pardasani's failure to complete the project, on October 19, 1987, McLendon requested that Pardasani turn the project over to him with all necessary information, including the location of the information in ICCF libraries. Pardasani refused to do so. McLendon then went to Employee & Community Relations Manager Goryl's office and spoke with Goryl and Controller Steil who was also present. With Steil's concurrence, Goryl advised McLendon to return to the Data Processing Department, call Pardasani into McLendon's office, make the same request a third time and, if Pardasani did not turn over the information, make the same request a fourth time coupled with the threat of immediate termination for failure to comply with the Data Processing Manager's order. Although Pardasani once again refused to provide the requested information, upon being advised of the consequences for another refusal, Pardasani agreed to turn over the requested information. Pardasani then

gave the information to McLendon, and left him with the understanding that he had received all of the information concerning the tag print program project.

Later that day, McLendon received a written statement from Pardasani advising him of additional information needed to finish the tag print program project. Upon receipt of this information, McLendon met with Employee and Community Relations Manager Goryl advising him that he had lost confidence in Pardasani and feared for the security of the data processing information in the department. He recommended to Mr. Goryl that Pardasani either be transferred out of the department or terminated.

Mr. Goryl spoke with several corporate officials concerning the situation, including Controller Steil, acting General Manager Jim Malia, Associate General Counsel Mike Williamson, Manager of Industrial Relations Bruce Petterson at Siemens' headquarters in Atlanta, Georgia, and other corporate officials. Goryl decided that Pardasani should be terminated on the basis of insubordinate conduct and unsatisfactory job performance. Siemens' officials uniformly concurred in Mr. Goryl's decision. Goryl prepared a letter of termination which Mr. McLendon signed. Mr. Pardasani was terminated on October 23, 1987.

On October 26, 1987 Pardasani filed a second charge with the Equal Employment Opportunity Commission alleging his termination was in retaliation for filing his May 29, 1987 charge of race, age and religious discrimination.

Plaintiff claims that statements by McLendon show animus against him because he is a member of a minority group, i.e. , Indian. However, Mr. McLendon's comments concerning Indian dress and an Air India bombing incident reveal no animus towards Indians as a people. Moreover, these comments are alleged to have been made by Mr. McLendon at a time when he was not a management representative. None of these comments were directed to Mr. Pardasani individually, and none were the subject of a complaint by Mr. Pardasani to Siemens.

Mr. Pardasani claims that certain racial jokes or remarks demonstrate national origin animus against him. However, the racial remarks/jokes referred to by Mr. Pardasani and certain witnesses did not involve Indians and generally were made at a time when Mr. McLendon was not a management representative. Further, black witnesses, John Lee and Nathan Slater, testified that they considered Tom McLendon a friend and, although neither are presently employed by Siemens', they continue to enjoy a personal social relationship with him. Additionally, all witnesses testified that the racial remarks were made in the context of jokes among friends and that the plaintiff was neither the object of nor a participant in the remarks/jokes.

With respect to the plaintiff's job performance, four witnesses, Manager of Production Control Herrington, Accounting Manager Al Woelfle, Accounts Payable Supervisor Jackson and Supervisor of Drafting Paul Gardner, testified as to plaintiff's continuing unsatisfactory job performance through his date of termination. Indeed,the plaintiff's own witnesses, Data Processing Systems Supervisor Truhett, Systems Analyst Anderson

and Systems Analyst Slater testified that Pardasani's job performance was unsatisfactory and/or he was the worst systems analyst in the department in 1986-87 even though he was the most senior analyst.

Following his termination, the plaintiff's duties were assumed by Data Processing Manager McLendon and other systems analysts. Approximately two years later, a systems analyst was hired at a comparable level.

III.

CONCLUSIONS OF LAW CONCERNING PLAINTIFF'S CLAIMS

A. Discriminatory Evaluation Claim

Plaintiff alleges disparate treatment. The burden of proof in disparate treatment cases is set forth by the United States Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff bears the burden of presenting a *prima facie* case of discrimination. Once a *prima facie* case is established, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the alleged adverse treatment. Once the defendant articulates a legitimate non-discriminatory reason, the plaintiff bears the burden of proving the articulated reason is a pretext for discrimination. At all times, the plaintiff bears the burden of proving, by a preponderance of evidence, that he was a victim of intentional discrimination.

To establish a *prima facie* case of national origin discrimination, plaintiff must show: (1) that he was a minority group member; (2) that he was qualified to receive a

better evaluation; (3) that he suffered adverse treatment; and (4) after receiving adverse evaluation, the employer gave a better evaluation to a non-minority group member who had performed similar work or engaged in similar conduct as that which caused plaintiff's low evaluation. See *Davin v. Delta Airlines*, 678 F.2d 567 (5th Cir. 1982); *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973).

Assuming the plaintiff established a *prima facie* case, the defendant articulated a legitimate non-discriminatory reason for the plaintiff's low rating – it was based upon the user's comments. Plaintiff presented no evidence that the user's comments were a pretext for intentional discrimination. Indeed, the plaintiff stated that he was on good terms with all of the Siemens' representatives who testified about his unsatisfactory work performance and Mr. Pardasani conceded that they had not discriminated against him.

B. Failure to Promote Claim

Plaintiff presented no facts to support his claim that Siemens failed to promote him to Senior Systems analyst because of his national origin and therefore, failed to establish a *prima facie* case of discrimination. There is no evidence that there was ever any vacancy by which he could have suffered an adverse personnel action. There is no evidence that any non-minority was ever promoted to Senior Systems Analyst. Clearly, the plaintiff cannot meet the second, third and fourth elements necessary to establish a *prima facie* case. See *Davin v. Delta Airlines, supra; McDonnell Douglas Corp. v. Green, supra.*

C. The Plaintiff's Termination

In order to establish a *prima facie* case of national origin discrimination concerning his termination, the plaintiff must show: (1) that he was a minority group member; (2) that he was qualified for the job; (3) that he was discharged; and (4) after his discharge, the employer either hired a non-minority group member to replace him or retained a non-minority group member who had engaged in conduct similar to that which caused the plaintiff's termination. *Davin v. Delta Airlines, supra; McDonnell Douglas Corp. v. Green, supra.* The plaintiff failed to establish the second and fourth elements of his *prima facie* case. Although the plaintiff insists that he was qualified for his job, Siemens found his performance, behavior and attitude, including insubordinate conduct, unacceptable. Mr. Pardasani's opinion of job performance is based exclusively upon his own perception. Indeed, his perception of satisfactory job performance during 1986-87 was not even shared by his own witnesses. However, the uncontroverted testimony of Siemens' witnesses was that they considered his job performance unacceptable. At the time of his termination, plaintiff was not performing his job at a level which met Siemens' legitimate expectations. *Elliott v. Group Medical & Surgical Service,* 714 F.2d 556 (5th Cir. 1983); *Kephardt v. Institute of Gas Technology,* 630 F.2d 1217, 1219 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981).

Additionally, the plaintiff was not replaced at the time of his termination. Mr. Pardasani presented no evidence that any other employee, especially a non-minority employee, violated security rules, was insubordinate, did

not timely finish projects, was considered to have unacceptable job performance and was retained while the plaintiff was terminated. Indeed, plaintiff failed to present any evidence of a non-minority employee receiving better treatment under similar circumstances, while the defendant presented substantial evidence that Company policies were enforced, and that both minority and non-minority employees violating company policies were terminated.

The plaintiff's case concerning his termination appears to be premised on the theory that he was discharged for not completing the tag print program project on October 19, 1987. Since the plaintiff alleges that he was discriminatorily denied the tools necessary to complete the project, he asserts that his discharge for failing to complete the project was discriminatory. However, the uncontroverted testimony of Company witnesses establishes that the immediate cause of termination was plaintiff's insubordinate refusal to turn over requested project information on October 19, coupled with his subsequent release of additional information which was supposed to have been furnished previously that same day.

The testimony of plaintiff's witnesses, Dane Truhett, Mark Anderson and Nathan Slater, contradicts plaintiff's claims that he was discriminatorily denied access to tools and commands needed to complete the tag print program project. Even assuming plaintiff established a *prima facie* case of discrimination, defendant's assertion that the immediate reason for termination was plaintiff's insubordinate conduct coupled with Data Processing Manager McLendon's loss of confidence in him constitute legitimate, lawful reasons for his discharge. Plaintiff has failed

to produce any evidence indicating that defendant's proffered and (sic) immediate reason for discharge was a pretext for discrimination.

D. Retaliatory Discharge Claim

In addition to his national origin claim, plaintiff asserts that he was discharged in retaliation for filing a May 29, 1987 charge of discrimination with the EEOC.

To establish a *prima facie* case of unlawful retaliation, plaintiff must show: (1) that he was engaged in an activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985); *Jack v. Texaco Research Center*, 743 F.2d 1129 (5th Cir. 1984); *McMillan v. Rust College, Inc.*, 710 F.2d 1112 (5th Cir. 1983).

The plaintiff's evidence does not establish a *prima facie* case because it does not show a "causal connection" between his May 29, 1987 EEOC charge and his October 23, 1987 termination. Apparently, plaintiff's employment continued without incident at the time he filed his first EEOC charge until mid-September, 1987. While the plaintiff testified that he believed Data Processing Manager McLendon denied him the opportunity to attend educational programs during this period, plaintiff failed to identify any educational program conducted in the Data Processing Department from which he was excluded. Employee & Community Relations Manager Goryl testified without contradiction that the plaintiff made no

request to use the company's educational assistance program during this period although he had used it in the past.

While plaintiff apparently claims that he began having notes put in his personnel file after he filed his EEOC charge, this argument is refuted by the evidence showing that such notes were placed in his file both before and after he filed the charge.

Assuming the plaintiff established a *prima facie* case of retaliatory discharge, the plaintiff failed to establish that retaliation, rather than insubordination, was the immediate cause for termination. "Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that 'but for' the protected activity [he] would not have been subjected to the action of which [he] claims. If the employee does not bear that burden of persuasion, [he] may not prevail." *Jack v. Texaco Research Center*, 743 F.2d at 1131; *McDaniel v. Temple Independent School District, supra ; Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981).

Defendant articulated legitimate non-discriminatory reasons for termination and its right to dismiss the plaintiff irrespective of his protected Title VII activity. At the time of his termination, plaintiff displayed unsatisfactory performance; violated the Information System security rules; violated management directives regarding ICCF library management; and was insubordinate to his direct supervisor. Section 704(a) of Title VII cannot excuse plaintiff's unacceptable performance, departmental policy violations and insubordination.

IV.

CONCLUSION

For the above reasons, the Court's dismissal of plaintiff's age and race claims at the close of the plaintiff's evidence at trial are affirmed and the Court hereby dismisses plaintiff's remaining claims of national origin and retaliation discrimination against defendant with all cost being taxed against the plaintiff.

ORDERED AND ADJUDGED this the 3rd day of December, 1990.

signed Britt Singletary
UNITED STATES MAGISTRATE